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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 585/53

LAMBERT RUN COAL COMPANY, PETITIONER,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Record filed

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UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Asheville, North Carolina, on the first Tuesday in July, beng the sixth day of the same month, in the year of our Lord one thousand nine hundred and twenty.

Present: Hon. J. C. Pritchard, Circuit Judge; Hon. Martin A. Knapp, Circuit Judge; Hon. Charles A. Woods, Circuit Judge.

AMONG other were the following proceedings, to-wit:

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi.

BE IT REMEMBERED that heretofore, to-wit, on July 19, 1920, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

Transcript of Record of Circuit Court Marion County

Filed June 29, 1920.

Lambert Run Coal Company
vs.
The Baltimore & Ohio Railroad Company.

STATE OF WEST VIRGINIA,
(2) County of Marion, to-wit:

Be it remembered that heretofore, to-wit, on the 12th day of June, 1920, a praecipe was filed in the office of the Clerk of the Circuit Court of Marion County, West Virginia, said praecipe being in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
Baltimore & Ohio Railroad Company,
Defendant.
} In Equity. No. ————

Issue summons to Defendant returnable to July rules.

JOHN A. HOWARD,
BUTLER, LAMB, FOSTER & POPE,
Solicitors for Plaintiff.

RUSH C. BUTLER,
ERNEST S. BALLARD,
FRANK E. HARKNESS,
Of Counsel.

June 12, 1920.

(3) The summons issued by the Clerk of said Circuit Court with the returns of service thereon are in words and figures following:

State of West Virginia
To the Sheriff of Marion County, Greeting:

You are hereby commanded to summon Baltimore & Ohio Railroad Company to appear before the Circuit Court of Marion County, at rules to be held in the Clerk's Office of said Court on the first Monday in July, 1920, to answer a bill in chancery exhibited against it in said Court by Lambert Run Coal Company.

And have then there this writ.

Witness, Clarence Currey, Clerk of said Court, at Court House in said County, the 12th day of June, 1920, and 57th year of the State.

CLARENCE CURREY, Clerk.

Executed the within summons on the within named The Baltimore & Ohio Railroad Company, a corporation, on the 12th day of June, 1920, by delivering on that day a copy thereof to T. D. Connell, Depot agent in the actual employment of the said Corporation, in the County of Marion, in the State of West Virginia, that being the county and State wherein the said T. D. Connell, the Depot Agent, in the actual employment of the said Corporation, resides, the President or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for it, and the Secretary, (4) Treasurer and Cashier of said Corporation, and the members of the Board of Directors thereof, all being absent from my county, and there being no other person within the said State than the said T. D. Connell, the said Depot Agent, upon whom there can be service of said summons.

HOWARD ADAMS,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

Served the within writ by delivering a true copy thereof to T. D. Connell of the Defendant, the Baltimore and Ohio Railroad Company, at the place in Marion County, West Virginia, where said defendant Corporation does business this 12th day of June, 1920. The principal office of the Defendant Corporation, not being in

the State of West Virginia. The President or other chief officer of the Defendant Corporation not residing in the State of West Virginia and the said Defendant Corporation doing business in Marion County, West Virginia.

HOWARD ADAMS,
Deputy for A. M. Glover, Sheriff of Marion County, W. Va.

(5) Order filing bill of complaint and Notice of Motion for injunction, Entering motion for injunction, filing petition, notices and bond for removal, and approving bond and ordering removal Entered by said Circuit Court on the 19th day of June, 1920, is in words and figures following:

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company. } In Chancery.

This day came the plaintiff, Lambert Run Coal Company, and tendered and asked leave to file its bill of complaint verified under oath, and also a notice in writing, duly served on the defendant, The Baltimore and Ohio Railroad Company, of said plaintiffs' motion for an injunction hereinafter mentioned and it is ordered that said bill and notice be and the same are hereby filed and thereupon said plaintiff moved the Court to award an injunction pursuant to the prayer of said bill. Thereupon came the defendant, The Baltimore and Ohio Railroad Company, and the defendant herein having given written notices to the plaintiff (and also to the Northern West Virginia Coal Operators Association), of its intention to file in this Court a petition and bond for the removal of this cause to the District Court of the United States for the Northern District of West Virginia prior to the filing of the same, and this being within the time provided by law for the filing of its petition and bond as aforesaid, and said Northern West Virginia Coal Operators Association not having appeared nor filed any peti-
(6) tion for intervention or to be joined as a party to this suit, and not now being a party to this suit, the de-

fendant filed its petition for removal of this cause to the District Court of the United States for the Northern District of West Virginia, and at the same time offered its bond, in the sum of one Thousand Dollars, with National Surety Company good and sufficient surety, pursuant to statute, and conditioned according to law. On consideration whereof it is ordered that said petition and bond and said notices so given by said defendant, be, and the same are hereby, filed, and this Court does hereby accept and approve said bond, and accept said petition and does order that this cause be, and the same is hereby, removed for trial to the next District Court of the United States for the Northern District of West Virginia, pursuant to the statute of the United States, and that all other proceedings in this Court in this cause be stayed.

(7) Notice of application for an injunction with return of service thereon filed in Open Court, June 19, 1920, is in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
Baltimore & Ohio Railroad Company, Defendant.

No Equity.
No. ———

NOTICE.

To the Defendant:

Please take notice that on the 19th day of June, 1920, at ten o'clock in the forenoon, or as soon thereafter as the matter may be heard, the Plaintiff will make application for an order of injunction enjoining you as prayed for in the Bill of Complaint to be filed in said cause, a copy of which is attached hereto, before the Honorable W. S. Haymond, Judge of said Court in Chancery at the Court House, Fairmont, West Virginia.

We also hand you herewith copies of affidavits of James M. Orr, Cletus H. Jenkins, Brooks Fleming, Jr., Samuel D. Brady and Claude M. Stubbins, which affida-

vits will be read to the Court in support of our motion for such order.

LAMBERT RUN COAL COMPANY,
JOHN A. HOWARD,
By BUTLER, LAMB, FOSTER & POPE,
Its Solicitors.

(8) Executed the within notice on the within named The Baltimore & Ohio Railroad Company, a corporation, on the 15th day of June, 1920, by delivering on that day a copy thereof to T. D. Connell, the depot agent in the actual employment of the said corporation, in the County of Marion, in the State of West Virginia, that being the county and State wherein the said T. D. Connell, the depot agent in the actual employment of the said corporation, resides, the president or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for it, and the secretary treasurer, and cashier of said corporation, and the members of the Board of Directors thereof, all being absent from my county, and there being no other person within the said State than the said T. D. Connell, the said depot agent, upon whom there can be service of said notice.

H. E. WOODWARD,
Deputy for A. M. Glover, Sheriff of Marion County,
West Virginia.

(9) The Bill of Complaint, filed in Open Court June 19, 1920, is in words and figures following:

IN THE

CIRCUIT COURT OF MARION COUNTY

STATE OF WEST VIRGINIA

LAMBERT RUN COAL COMPANY, *Plaintiff*,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant.

In Equity No. .....

BILL OF COMPLAINT.

JOHN A. HOWARD,
BUTLER, LAMB, FOSTER & POPE,
Solicitors for Plaintiff.

RUSH C. BUTLER,
ERNEST S. BALLARD,
FRANK E. HARKNESS,
Of Counsel.

IN THE

CIRCUIT COURT OF MARION COUNTY

(10) STATE OF WEST VIRGINIA

LAMBERT RUN COAL COMPANY, *Plaintiff*,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant.

In Equity No. ....

BILL OF COMPLAINT.

To the Honorable Judge of the Circuit Court of the County of Marion, State of West Virginia, in Equity Sitting:

Plaintiff respectfully represents:

1. That plaintiff, Lambert Run Coal Company, a corporation organized and existing under the laws of the

State of West Virginia, with its principal office in the City of Fairmont and County of Marion in said State, brings this, its bill of complaint, on behalf of itself, and also on behalf of such other operators of coal mines served by defendant as are situated similarly to plaintiff and desire relief similar to that herein sought and who shall intervene in this suit.

2. That defendant, The Baltimore & Ohio Railroad Company, is a corporation organized and existing under the laws of the State of Maryland, and is a common carrier by railroad engaged in the transportation of passengers and property between points in the State of West Virginia, and points in other States, and as such is subject to the Interstate Commerce Act, to-wit: the Act to Regulate Commerce as amended by the Transportation Act, 1920.

3. That this is a suit of a civil nature in equity. This suit necessarily involves and presents for decision the construction of the aforesaid Interstate Commerce Act and particularly paragraph (12) of Section 1 thereof, which said paragraph reads as follows, to-wit:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

And plaintiff shows that it is entitled under and by

virtue of the provisions of said paragraph, during periods when the supply of cars available on defendant's line for transportation of coal does not equal the requirements of the mines served by it, to a distributative share of such cars proportionate to the rating of its mine, and that by the acts of the defendant hereinafter complained of the plaintiff is deprived of such share of cars available for the transportation of coal to its great and irreparable damage as hereinafter more particularly set forth.

4. That plaintiff is, and for thirteen years last past has been, engaged in the business of mining, producing, selling and shipping bituminous coal and owns and operates a mine known as the Clauson Mine, having a maximum daily productive capacity of approximately 600 tons, and a daily rated capacity according to the ratings established by the defendant as hereinafter more particularly set forth, of 575 tons, which said mine is located upon the line of the defendant in said State and connected therewith by a switch connection and is served exclusively by, and dependent upon, the said defendant as an initial carrier for the transportation of the coal so mined to the purchasers and consumers thereof.

That plaintiff has, in the conduct of its business aforesaid, built up a valuable goodwill, and has an extensive market for the coal produced and mined by it as aforesaid, throughout the State of West Virginia and neighboring States, the preservation of which goodwill and business depends upon the constant production of coal and the uninterrupted conduct of its mining operations. The character of the coal mined by the plaintiff and the location of plaintiff's said mine are such that it is not practible to store said coal, and in order to maintain and continue its operations it is necessary that it should receive from defendant adequate railroad facilities for the transportation of its coal as and when mined over the lines of the defendant, all as hereinafter more fully set forth.

That in addition to the said mine of the plaintiff there are many other bituminous coal mines served by the defendant, to-wit: above 750, with many of which the

plaintiff, in its said business of mining, producing, selling and shipping bituminous coal, is in competition.

5. That for many years last past the defendant has maintained ratings of the capacity of the mines of the plaintiff and of the mines of plaintiff's competitors and all other mines served by the defendant, which ratings are for the purpose of determining the distribution of cars to the said mines and are commonly called mine ratings.

That under paragraph (12) of Section 1 of the said Act the defendant now maintains such mine ratings, the rules governing the establishment and application of which are as set forth in Exhibit A, attached to this bill of complaint and hereby made a part hereof.

That under said rules the defendant has in the past, from time to time, established mine ratings for the respective mines served by it including a rating of the plaintiff's said mine which said rating as most recently established, to-wit: for the period from May 10 to June 9, inclusive, 1920, was 11.5 fifty-ton cars per day.

That under paragraph (12) of Section 1 of the said Act defendant is obligated and required to make just and reasonable distribution of cars for transportation of coal among coal mines served by it and, during any period when the supply of cars available on its line for transportation of coal does not equal the requirements of the mines served by the defendant, to apply the said mine ratings and count each and every car furnished to or used by any such mine for transportation of coal against that mine; and during any such period, plaintiff is entitled to receive a share of such cars based on the application of the said mine ratings and the counting of each and every car as aforesaid, and is further entitled to the benefit and protection of the provisions of said paragraph 12 of said Section 1 to the end that no other coal mine located on the defendant's line shall receive a greater proportionate share of such cars either because of failure of the defendant to apply said mine ratings or to count each and every car as aforesaid, or for any other cause or reason whatsoever.

6. That for many weeks last past the supply of cars

available on the defendant's line for transportation of coal has not been, and is not now, equal to the requirements of the mines served by it, but on the contrary there has been and is an acute shortage of such cars and the supply thereof has been and is inadequate to meet the requirements of the business of the defendant.

That although under paragraph (12) of Section 1 of the said Act the defendant, under the circumstances above alleged is bound, in making distribution of cars available on its line for transportation of coal, among the coal mines served by it, to maintain and apply the mine ratings of such mines and to count each and every car furnished to or used by a mine for transportation of coal against that mine, the defendant for many weeks last past has failed, refused and neglected, and now fails, refuses and neglects so to do, but on the contrary has for many weeks last past furnished and now furnishes cars for transportation of coal to certain of the mines served by it other than the plaintiff's said mine in excess of the share to which the said other mines were and are entitled under the application of their respective mine ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine, while at the same time failing and refusing to furnish to the said mine of the plaintiff the share of such cars to which the said mine was and is entitled on the said basis, the said unlawful distribution being made and effected by defendant under and in pursuance of certain car distribution rules maintained and applied by it and now in effect, which said rules are as set forth in Exhibit A, attached to this bill of complaint and made a part hereof.

Plaintiff is informed and believes and therefore alleges the fact to be that the acute car shortage hereinbefore referred to is continuing and will continue for a long time to come and that the supply of cars available on the defendant's line for transportation of coal shipped from the mines served by it will not equal the requirements of the said mines but will be inadequate to meet such requirements.

Plaintiff further alleges that it has made earnest and repeated requests upon the defendant and has constantly attempted to persuade and induce the defendant by all

lawful means within its power to discontinue the defendant's said unlawful practice with respect to the distribution of cars available on the defendant's line for transportation of coal, among the mines served by it, but the defendant has failed, neglected and declined to cease and desist from the said unlawful practice and intends, proposes and threatens to continue the same without abatement or alteration in any particular and, as plaintiff is informed and believes and therefore alleges, will so continue the same unless restrained by the order of this Court as hereinafter prayed, all to the great and irreparable damage and injury of the plaintiff as hereinafter more fully set forth.

7. Plaintiff is informed and believes and therefore alleges the fact to be that prior to the assumption by the Federal Government of control of the railroad of defendant and other railroads in the United States (hereinafter referred to as Federal control), it was the general practice of many railroads serving bituminous coal mines, during periods when the supply of cars available on their respective lines for transportation of coal did not equal the requirements of the mines served by them respectively, to deliver cars for the transportation of railway fuel coal, to the mines furnishing such coal, in excess of the share of the cars available on their respective lines for transportation of coal to which such mines would have been entitled under a distribution proportionate to their respective mine ratings, which practice is generally referred to as the practice of assigning cars; that during Federal control the said practice of assigning cars continued in effect until it came to the attention of the United States Fuel Administrator and he thereupon made representations to the Director General of Railroads with respect to its disastrous effect upon the coal mining industry and urged its discontinuance and the substatution therefor of the practice of distributing all cars for transportation of coal in proportion to the ratings of the respective mines; that the Director General of Railroads declined to accede to the representations of the United States Fuel Administrator and thereupon the question was presented to the President and considered by him in conference with the United States

Fuel Administrator and the Director General of Railroads, and as a result of the said reference to the President the United States Fuel Administrator issued a statement and order in the words and figures following, to-wit:

"May 24th, 1918.

Ten cents a short ton was stricken from the mine price of all bituminous coal in the United States, by order of Fuel Administrator H. A. Garfield tonight. The new price takes effect at seven o'clock tomorrow morning, and represents an average reduction of nearly five per cent. The order reads as follows:

'THE UNITED STATES FUEL ADMINISTRATOR, acting under authority of an Executive Order of the President dated 23 August, 1917, appointing said Administrator and of subsequent Executive Orders and in furtherance of said Orders and of the Act of Congress therein referred to and approved August 10, 1917.

Hereby orders and directs that all prices for bituminous coal f. o. b. mines in the coal producing districts throughout the United States fixed by the said Executive Order of the President dated 21 August, 1917, and subsequent orders of the United States Fuel Administrator and in effect at 7 A. M. on the 25th day of May, 1918, shall be and the same hereby are reduced as to all shipments made after 7 A. M. on the 25th day of May, 1918, by the sum of ten cents for each net ton of 2,000 pounds.

This order shall in no way affect the increase contained in the Executive Order of the President, dated 27 October, 1917, adding the sum of forty-five cents to the prices fixed for bituminous coal under the terms and provisions set forth in said last mentioned Order.'

The reduction will mean an annual saving to consumers of a sum estimated by the Fuel Administration at $60,000,000. The President has directed that the railroads pay the Government price for coal. The increased cost of railroad fuel thereby occasioned is also estimated at $60,000,000 per annum. The reduction of 10 cents per ton on all coal will, however, reduce the net increased cost to the railroads to $45,000,000 per annum. Under the President's plan, the railroads will furnish cars to

all coal mines alike, without discrimination except as dictated by the prior requirements of the railroads for operating purposes and the needs of domestic consumers and of the war.

Under the present war demands, the maximum output of every mine working at full time would still be insufficient to meet the country's coal needs. The principle of equal car supply has accordingly been adopted so as to make for as steady an operation as possible of all properties, and for continuous employment of men, thus making for maximum output.

The introduction of the principle of even car supply will reduce the general average overhead of mine operation, and thereby justifies the Administration in putting out a price reduction order. It is understood that the mine prices thus fixed will remain undisturbed until the United States Fuel Administrator has before him the cost returns for the twelve months ending August 31, 1918. The returns thus far in are being carefully studied by Fuel Administration accountants and engineers with a view to making the utmost saving to the public that is consistent with a maximum production of coal.

The order issued tonight will have no effect on the price of anthracite coal, which forms the bulk of the domestic consumption fuel in the eastern part of the country.

Consumers of bituminous coal who have already entered their orders for the year's coal supply, but whose coal has not yet been delivered, will, of course, receive their supplies at the reduced price effective tomorrow. This price applies to all coal which leaves the mines after seven A. M., May 25, no matter how long the order for the delivery of the coal has been standing.

Coal delivered after seven A. M., May 25, under contracts which have been entered into since December 29, 1917, will be billed at the new price. Under the regulation of the Fuel Administration all such contracts call for the delivery of coal at the government price effective at the time of delivery."

Plaintiff is informed and believes and therefore alleges the fact to be that thereafter and on or about July 1, 1918, the Director General of Railroads, in execution of the policy announced in the said order of the United

States Fuel Administrator, issued an order putting into effect the distribution of all cars available for transportation of coal in proportion to mine ratings, in the Eastern, Allegheny and Pocahontas Regions, which said order was in the words and figures following, to-wit:

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads
Washington, July 1, 1918.
DIVISION OF OPERATION In reply refer to File No.
CAR SERVICE SECTION 257-52
W. C. Kendall, Manager
W. L. Barnes
A. G. Gutheim
W. J. McGarry
C. B. Phelps
G. F. Richardson
Assistant Managers.

Mr. A. H. Smith,
Regional Director, Eastern Region,
New York City.
Mr. C. H. Markham,
Regional Director, Allegheny Region,
Philadelphia, Penna.
Mr. N. D. Maher,
Regional Director, Pocahontas Region,
Roanoke, Virginia.

Dear Sir:—

Effective June 24, 1918, the assignment of cars for loading of railroad fuel at mines on the Pennsylvania Railroad, the B. & O. Railroad, Lines East, and their short line connections were cancelled. It is now desired that the assignment of cars for railroad fuel loading shall be cancelled on all other lines in the Eastern, Allegheny and Pocahontas Regions, effective July 5, 1918. This is to request that you so arrange.

The United States Fuel Administration is advised of these instructions and through its District Representatives in the coal producing districts will obtain an adequate current supply of coal of substantially like quality as has heretofore been had unless vital war necessities

makes this impossible. In the latter event the Fuel Administration will handle the matter with the Railroad Administration in Washington and the Purchasing Committee here will deal with individual railroads on the subject as may be necessary. Should the result of this order be to deplete the essential coal supply of any road, the Car Service Section should be advised by wire immediately.

We beg to suggest that all the coal producing roads in your territory who will cancel their assigned car orders in accordance therewith, should immediately wire all foreign lines obtaining fuel from mines on their roads, so that such foreign lines will be advised of the change in car distribution.

CAR SERVICE SECTION.

4
CC to Mr. H. B. Spencer,
J. D. A. Morrow,
A. W. Calloway,
W. A. Marsh."

Plaintiff is informed and believes and therefore alleges the fact to be that thereafter and effective July 10, 1918, a similar order was issued by the Director General of Railroads, putting into effect the distribution of all cars available for transportation of coal in proportion to mine ratings, throughout the remainder of the United States, which said order was in the words and figures following, to-wit:

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads
Washington, July 6, 1918. j
DIVISION OF OPERATION In reply refer to File No.
CAR SERVICE SECTION 257-52

W. C. Kendall, Manager
W. L. Barnes
A. G. Gutheim
W. J. McGarry
C. B. Phelps
G. F. Richardson
Assistant Managers.

Mr. B. L. Winchell,
Regional Director, Southern Region,
Atlanta, Georgia.
Mr. R. H. Aishton,
Regional Director, Northwestern Region,
Chicago, Illinois.
Mr. Hale Holden,
Regional Director, Central Western Region,
Chicago, Illinois.
Mr. B. F. Bush,
Regional Director, Southwestern Region,
St. Louis, Mo.

Dear Sir:—

Effective July 10th, 1918, please abolish the practice of assigning cars for railroad fuel loading at bituminous coal mines on all lines of railroad in the Southern, Southwestern, Central Western and Northwestern Regions. This will complete the program of abolishment of this practice in the entire country.

The United States Fuel Administration is advised of these instructions and through its District Representatives in the coal producing districts affected will see that the carriers who draw fuel from such districts will obtain an adequate current supply of coal of substantially like quality as has heretofore been had unless vital war necessities make this impossible. In the latter event, the Fuel Administration will handle the matter with the Railroad Administration in Washington, and the Purchasing Committee here will deal with individual railroads on the subject as may be necessary.

Should the result of this order be to deplete the essential coal supply of any road the Car Service Section should be advised by wire immediately.

We beg to suggest that all the coal producing roads in your territory which will cancel their assigned car orders in accordance therewith, should immediately wire all foreign lines obtaining fuel from mines on their road so that such foreign lines will be advised of the change in car distribution.

CAR SERVICE SECTION.

4
CC to Messrs. H. B. Spencer
F. M. Whitaker
J. D. A. Morrow
A. W. Calloway
W. A. Marsh."

Plaintiff is informed and believes and therefore alleges the fact to be that thereafter and until the termination of Federal control the said system of distribution of all cars available for transportation of coal in proportion to mine ratings was generally observed on all of the railroads of the United States.

Plaintiff further alleges that after the termination of Federal control and on February 29, 1920, the said practice of distribution of all cars available for transportation of coal in proportion to mine ratings was continued by the defendant and many railroads throughout the United States until on or about April 15, 1920, when the defendant discontinued the said practice and inaugurated the practice hereinbefore described of assigning to certain of the mines served by it, other than the plaintiff's said mine, cars for the transportation of railway fuel coal in excess of the share of cars available on its line for transportation of coal to which the said other mines would have been entitled under the maintenance and application of their respective mine ratings and the counting of each and every car furnished to, or used by, a mine for transportation of coal, against that mine, and distributing to the said mine of the plaintiff fewer cars than it was entitled to on the said basis.

8. That bituminous coal tends to deteriorate if placed in storage after being mined, and is also subject to serious danger from spontaneous combustion when stored, and in many instances storage of coal is impracticable because of the location of the mine producing it and the contour of the ground surrounding the mouth thereof. In the great majority of instances, for one or more of the reasons aforesaid, it is impracticable or dangerous to store bituminous coal at the mine, and mines therefore cannot usually be operated except when they are able to load and ship coal as and when it is mined. When any

such mine is unable to load and ship coal as aforesaid, it is compelled to suspend the mining of coal until cars are furnished in which it can be loaded and shipped.

That the operation of plaintiff's said mine and of all bituminous coal mines involves the incurring of numerous and great overhead expenses which are fixed and constant and accrue whether or not the mine is in operation. The said overhead expenses include interest on the investment in the plant (including mine, buildings, machinery, equipment, etc.); taxes and insurance, depreciation on buildings, machinery and equipment; superintendence (including the wages and expenses of the mine superintendent and his permanent force); ventilating and keeping the mine clear of water (including the maintenance and operation of the pumping machinery and the salaries and expenses of the engineer and his staff); the feeding and care of animals used in the operation of the mine; the salaries and expenses of the sales organization; and the salaries and expenses of the general office organization. All of the said expenses are incurred by the plaintiff daily irrespective of the amount of coal produced or whether the mine is or is not in operation.

That every hour of working time that a mine is closed down for any cause increases the amount of overhead cost properly and necessarily chargeable to each ton of coal produced, and the said overhead cost increases with the increase of idle time.

The necessary effect of failure or refusal on the part of a carrier to maintain and apply mine ratings to all of the mines served by it and count each and every car furnished to or used by each and every such mine for transportation of coal against that mine is that the per ton overhead costs of mines receiving less than their proportionate share of cars increase directly as their car supply decreases.

That the chief incentive of mine labor to continue in the service of a particular mine is the regularity of the employment there afforded. As between neighboring mines or mines in the same or neighboring districts, mine labor will go to and remain at the mine which offers the most continuous employment and thereby the greatest opportunity for earning. Mines which have a greater proportion of idle time than other mines either in or out

of the district, are unable to hold their labor and as a result are compelled to operate, when they can operate at all, with a depleted force of laborers consisting of the the lowest and most unreliable grade which is the last to leave on account of unsatisfactory labor conditions. Furthermore a mine with a large proportion of idle time not only loses laborers to other mines having less idle time, but likewise loses laborers to other lines of employment from which it is difficult or impossible to induce them to return to the business of mining.

That the effect of this situation on the spirit and morale of the mine labor is exceedingly injurious and results not only in a shortage of labor but in a distinct and dangerous lowering of the loyalty and assiduity of those who remain, so rendering less efficient the operation of the mine.

That in addition to the effect on overhead cost and mine labor which is above referred to, the idle time of a mine resulting from insufficient car supply has the further serious effect of interfering with its commercial contracts, destroying the good will of its customers, decreasing the number of its patrons, reducing the legitimate profits of its business and generally breaking down and impairing its credit.

That on the other hand, the effect on the operators of mines enjoying assigned cars is to permit the steady operation of the mines and the development and maintenance of their full productive capacity, to decrease the overhead cost of production per ton of coal, to attract labor of the highest grade and furnish it steady and satisfactory employment yielding an adequate annual wage, to build up and maintain their business, increase the number of their customers, enhance the value of their good-will in the trade, and in many other ways to give them advantages over their unfavored competitors which advantages are unlawful and greatly to the detriment and damage of the plaintiff, all others similarly situated and the general public.

9. That the practice of assigning cars has this further effect on the rights and business of the plaintiff and the interests of the public, namely, that cars which are assigned to particular mines are, by reason of such assign-

ment, frequently held idle awaiting placement at and use by the mine to which they are assigned, with the result that the average daily number of cars available for loading at all mines is decreased and the share to which mines receiving no assigned cars are entitled, is reduced beyond the reduction following directly from the assignment and use of cars on a particular day.

10. That all of the considerations relative to the storage of bituminous coal at the mines set forth in paragraph 8 hereof apply at the plaintiff's said mine, that is to say, the coal produced at said mine would deteriorate if placed in storage and would be liable to serious danger of spontaneous combustion, and moreover the location of plaintiff's mine and the contour of the ground surrounding its mouth renders the storage of coal thereat unpracticable, so that when, because of failure of car supply, the coal from its mine cannot be loaded and shipped as and when it is mined, said mine must be shut down and its operation suspended until cars are available for loading and shipping.

That plaintiff incurs in connection with the operation and maintenance of its said mine all the overhead costs mentioned in paragraph 8 hereof, and said overhead costs continue during idle time due to a failure of car supply. That in addition to said overhead costs plaintiff has been and is incurring large expenses during periods of idle time in this, that in order to retain labor at its mine and prevent the disruption of its organization, it has of necessity given its laborers employment not connected with the mining of coal or the operation or maintenance of its said mine, from which employment of such labor the plaintiff derives no profit commensurate with the expense incurred.

11. That because of the acute car shortage that has existed for several months last past, as elsewhere in this bill more particularly set forth, and because of the strike, beginning November 1 and ending about December 15, 1919, which closed practically all of the bituminous coal mines in the United States operated by union labor, there has been ever since November 1, 1919, and prior thereto, and still exists, a demand for coal which cannot be sup-

plied; that there is an actual acute shortage of coal available in yards and at plants and industries of the United States for current use and that the supply of coal on hand available for such current use has been for several weeks last past and is now diminishing; that because of these facts the plaintiff at all times since Apl. 15, 1920, could have sold and disposed of, in the open market and under contracts at prices which would have realized a profit, all coal which its said mine was capable of producing when running at its full capacity, and plaintiff has at all times during said period been ready, willing and able to load with coal produced at its said mine all cars to which it was entitled under its mine ratings during such period, and could and would have disposed of all such coal at a profit as aforesaid.

12. That the plaintiff herein, as a result of the acts and omissions of the defendant complained of herein in failing and refusing to maintain and apply ratings of the mines served by the defendant and to count each and every car furnished to or used by a mine for transportation of coal against that mine, all in violation of the Interstate Commerce Act, and particularly paragraph (12) of Section 1 thereof, has for many weeks passed suffered and is now suffering, all of the damages, losses and injuries to its property and business which are set forth and described herein. That during March, 1920, plaintiff's said mine was entitled to 152.3 fifty-ton cars and received 165.3 such cars, while during May, 1920, plaintiff's said mine was entitled to 140.14 fifty-ton cars and received 108 such cars; that the per-ton overhead expenses of the plaintiff in the production of coal at its said mine were increased during the month of May, 1920, by reason of idle time growing out of insufficient car supply at least in the amount of 19.5 cents; that the miners remaining to the plaintiff are less industrious and efficient and more prone to discontent and disturbance than prior to the inauguration of the said policy of unlawful distribution; that the general business and good-will of the plaintiff has been seriously hurt and damaged and its customers have become dissatisfied; that the profits to which plaintiff is legitimately entitled on its business of mining, shipping and selling coal have been seriously depleted

and diminished; and that because of the unlawful acts of defendant herein complained of the average cost to the plaintiff of producing a ton of coal at its said mine increased from $2.36 in March, 1920, to $3.00 in May, 1920.

13. That the acts of the defendant complained of herein in violation of paragraph (12) of Section 1 of the said Act are of a continuing nature and the only remedy which the plaintiff has at law for enforcing the plaintiff's said rights against the defendant under paragraph (12) of Section 1 of the said Act, is to bring successive suits for damages, which would require the bringing of a multiplicity of suits involving great and burdensome costs and expenses to the plaintiff. Plaintiff further shows that the continuance of said unlawful practices by the defendant will result in the partial or complete disruption of plaintiff's organization and in great and progressively increasing damage to the property, good-will and business of the plaintiff, and a great and permanent decrease in the value thereof, to the irreparable injury of the plaintiff and that the plaintiff is without any adequate remedy at law for such injury, and will continue to suffer all of the said damages, losses and injuries to its property and business as a result of the said threatened and intended continuation of the said unlawful practices of the defendant herein unless defendant is restrained by the order of this court as hereinafter prayed.

14. That there are numerous corporations, firms and individuals operating other mines served by defendant who are in a situation similar to that of the plaintiff as hereinabove set forth, and who have suffered, are suffering and will suffer losses, damages and injuries similar to those suffered by plaintiff as herein alleged and arising out of the aforesaid illegal acts and practices of the defendant; that unless said defendant is restrained and enjoined in this proceeding as prayed herein from continuing said illegal acts and practices as against such of said persons, firms and corporations as desire relief against such acts and practices, there will result a multiplicity of suits and actions, wherefore plaintiff brings this bill on behalf of itself and of all others similarly

situated who shall intervene herein and claim the benefit of the relief herein prayed.

FORASMUCH therefore as the plaintiff is without adequate remedy at law the plaintiff avers that the jurisdiction of this court of equity attaches and that an injunction as hereinafter prayed is the sole means whereby the plaintiff can secure the relief to which it is entitled in the premises and that the questions of law which would be presented in any actions at law if instituted as aforesaid for the purpose of enforcing the Interstate Commerce Act would be the same and can be disposed of in this single proceeding in equity and the entire matter herein adjudged and determined and the plaintiff's rights protected against the unlawful acts of the defendant, thus avoiding a multiplicity of suits, to the end that the said The Baltimore & Ohio Railroad Company which is hereby made party defendant to this the plaintiffs bill of complaint may be required to make full, true and complete answer thereto but not under oath (answer under oath being hereby expressly waived), and that said defendant may be enjoined as hereinafter prayed.

WHEREFORE, the plaintiff prays that the defendant be enjoined, during any period when the supply of cars available on defendant's line for transportation of coal does not equal the requirements of the mines served by defendant, from distributing to any of the mines served by it more cars than the said mines are entitled to under the maintenance and application of their respective mine ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine; and that the defendant likewise be enjoined, during any such period, from distributing to the said mine of the plaintiff a smaller number of cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting against the said mine of each and every car furnished to or used by it for transportation of coal; and that the defendant likewise be enjoined, during any such period, from observing or enforcing its rules Nos. 8, 9 and 10, or any or either of said rules hereinabove referred to, which said Rules Nos. 8, 9 and 10 are as follows, to-wit:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. R'y Co.*, 12 I. C. C. 398, and *Trace* vs. *Chicago & Alton Railroad Co., et als.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned cars.'

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

or any other rules, regulations or practices having the same or like effect; and that the defendant be ordered and directed to comply with the provisions of paragraph (12) of Section 1 of the said Act and, during any such period, to maintain and apply mine ratings to all of the mines served by the defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it; and that the defendant be enjoined, during any such period, from adopting or enforcing for any cause, reason or pretext whatsoever any rule, regulation or practice, which, or the result of which, will give to any mine, served by defendant, cars for transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or less than or different from the ratio of the total number of cars available on defendant's line for transportation of coal to the total rated capacity of all mines served by defendant.

And the plaintiff further prays that such other and

further relief be granted in the premises as equity and justice may require.

And may it please your Honor, to the end aforesaid, and on account of the irreparable loss and damage that will result to the plaintiff unless a temporary order is granted, to grant such temporary restraining order to remain in force until the hearing and determination of the application for a temporary injunction as hereinafter prayed, restraining said defendant, its agents and representatives, as aforesaid.

May it please your Honor that a temporary or interlocutory injunction pursuant to the foregoing prayer to remain in full force until the final hearing of this cause or until the further order of this court, be forthwith entered and granted against the defendant, its agents and representatives.

And may it please your Honor to grant unto the plaintiff the writ of injunction directed to said defendant perpetually restraining and enjoining it, its agents and representatives in manner and form aforesaid. And for this this plaintiff will ever pray.

LAMBERT RUN COAL COMPANY,
Plaintiff.

Rush C. Butler
Ernest S. Ballard
Frank E. Harkness
Of Counsel.

by John A. Howard,
Butler, Lamb, Foster & Pope,
its Solicitors.

STATE OF WEST VIRGINIA,
County of Marion,—ss:

Clarence D. Robinson, being duly sworn, on oath, deposes and says that he is Secretary & Treasurer of the above named Lambert Run Coal Company, the plaintiff herein; that he has read the foregoing bill of complaint and knows the contents thereof; that the matters and things therein stated are true of his own knowledge except as to such matters as are alleged to be on information and belief and as to those he believes them to be true.

CLARENCE D. ROBINSON.

Subscribed and sworn to before me this 14th day of June, A. D., 1920.

IRA L. SMITH,
Notary Public.
Marion County, West Virginia.

My Commission expires Jan. 7, 1913.

EXHIBIT A.

THE BALTIMORE AND OHIO RAILROAD CO.
Coal & Coke Railway
Morgantown & Kingwood Railroad

Transportation Department

Equipment Circular—General Superintendent Transportation No. 4-C
.....Circular—Superintendent's No.....
Equipment
(Cancels Equipment Circular—General Superintendent Transportation No. 4-B)

These rules are a joint issue of the railroads whose names appear at the top and where the words "above named railroad" or "this railroad" appear in the rules they have reference to the railroad upon which the mine is located.

RULES GOVERNING THE RATING OF COAL MINES AND CAR DISTRIBUTION TO SUCH MINES

Effective April 16, 1920

RULES FOR RATING FOR CAR DISTRIBUTION PURPOSES COAL MINES, LOADING COAL AT MINE TIPPLES

The following rules shall govern the rating of coal mines as the basis for the distribution of empty cars to such mines:

(a) The daily capacity of each mine (other than mines covered by paragraphs b and c) shall be determined by taking the total coal tonnage shipped by the mine during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. The result shall be termed the "daily rating" of such mine and shall be the basis on which cars shall be distributed to it.

(b) The daily capacity of a mine which is served jointly by or for two or more carriers (steam, electric, or water) shall be determined by taking the total tonnage shipped by the mine via all such carriers during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. The result shall be termed the "gross daily rating" of such mine and shall be the basis on which cars shall be distributed to it; provided, that if track or other limiting conditions further restrict its ability to ship via above named railroad, such conditions shall be the limiting factor for the above named railroad's daily rating of such mine.

(c) The daily capacity of a mine delivering part of its output to a coking plant, to locomotives at the tipple, or to local trade shall be determined by taking the total coal tonnage shipped in railroad cars during the preceding month, dividing it by the number of hours worked (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more

than 10 hours) of the individual time. The result shall be termed the "daily rating" of such mine and shall be the basis on which cars shall be distributed to it.

(d) When the fires are withdrawn from part (or all) of the ovens at an operation coking part of its output, for the purpose of shipping coal production formerly used in charging ovens, the daily rating of the mine shall be increased to include the average tonnage per day so diverted in the previous month until the beginning of the next rating period, at which time the daily rating of the mine shall be determined in accordance with paragraph a or c, due allowance being made for such average tonnage so diverted in computing the new daily rating. A corresponding decrease of the mine's rating will be made when the ovens are again placed in blast.

When a mine that has been coking its entire output desires to ship coal and the fires are withdrawn from part (or all) of its ovens, it shall be given a daily rating for coal shipments corresponding to the average tonnage of coal formerly coked until the beginning of the next rating period, at which time the daily rating of the mines shall be determined in accordance with paragraphs a or c.

(e) In determining the number of hours worked in each day at a mine, time will be counted from the established time for beginning work (or the actual time if earlier or later than the established time) on the tipple until the dumping of coal finally ceases for the day, making deductions for the noon intermission when it is taken and for the time lost by reason of being blocked with loads, waiting for additional empty cars, or other railroad disability; provided, that if a greater number of hours is worked in the mine than on the tipple, the mine hours must be reported also, and the number of hours worked in the mine must then be used as the number of hours worked in producing the coal. (See paragraphs a, b and c.) Time may be deducted for railroad disability only when such railroad disability actually reduces the quantity of coal dumped that day. Time may be deducted when tipple is used for dumping coal into locomotives only when the tipple can not be simultaneously operated for loading cars.

(f) Daily ratings determined in accordance herewith will be revised monthly and made effective on the 10th of the month following the month's performance on which the rating is determined.

(g) If a mine be idle for a period of one full caledar month or more, the last rating determined will be the rating when work is resumed, provided the mine conditions be substantially the same as when the mine closed.

(h) Rating for development purposes based on current performance will be assigned to a new operation in previously undeveloped coal. A new mine will be furnished with a supply of cars sufficient to enable it to work freely in the course of development for a period not exceeding 6 months after shipments are begun; provided, that if theretofore its ability to load 150 tons per shift (not, however, to exceed 2 shifts per day) is established, it shall then be rated. A new operation of any other character shall be entitled to a development rating for a period of one month after shipments are begun.

(i) Each mine shall report on a prescribed form to the car distributor of the district promptly at the close of each day:

1. The number of hours in the recognized work day;

2. The established time for beginning the day's work;

3. Actual time work was begun this day on the tipple;

4. If the noon hour intermission is taken, how long;

5. Time lost during the day account:

Waiting for railroad cars or other railroad disability.....hours;
Strikes or mine labor shortage.....hours;
Mine disability. . .....hours;
No Market. . .....hours;
All other causes. . .....hours;

6. Time work on tipple ceased for today;

7. Number of hours worked today on the tipple,....; and in the mine, ... (See paragraph e);

8. Number of net tons of coal loaded for shipment via the above named railroad.

9. Total number of net tons of coal produced and shipped via each other outlet.

Joint mines shall furnish this daily report to each carrier serving them.

If, after notice from the railroad, an operator persistently fails to furnish this daily report, he will be penalized by curtailment of his car supply to the amount of 25 per cent. of distribution for one week.

(j) At the close of each month the mine manager or superintendent in charge of actual operation shall report under oath on a prescribed form to the General Superintendent of Transportation, B. & O. R. R. Building, Baltimore, Md., separately for each mine for each month, as follows:

1. Number of hours in the recognized work day;

2. Total number of net tons of coal produced;

3. Total number of net tons of coal shipped via the above named railroad;

4. Total number of net tons of coal shipped via each other outlet;

5. Total number of hours worked during the month. (See paragraph e.)

This report must be forwarded not later than the 3d of the month following that for which the statement is furnished; provided, that where the location of the mine makes it inconvenient to furnish a report under oath by that date, a report not under oath may be forwarded, and the sworn report forwarded not later than one week

after. Joint mines shall furnish this monthly report to each carrier serving them.

(k) If an operator declines or persistently fails to make reports or to make accurate reports to the carrier as required herein, it will be assumed that the mine worked full hours in producing and loading into railroad cars the tonnage shipped, and the daily rating will be computed accordingly.

(l) A statement showing the mine ratings which will govern the car distribution for the succeeding month will be furnished as soon as such ratings are ascertained to such coal miners on this railroad as make application for the same. Such statement will show the mine rating of each mine and the total mine ratings of each coal loading district and the aggregate ratings for all mines and all districts on this railroad, and the percentage of each such figure to the total.

RULES GOVERNING THE DISTRIBUTION OF CARS TO COAL MINE TIPPLES.

Whenever the available car supply in any region (or district) is such that all orders for cars can be filled, cars shall be placed at each mine in accordance with its daily order, except that whenever a mine holds unbilled coal loads, it shall be entitled only to empty cars equal in number to the difference between the rating last established for the mine and the number of unbilled coal loads so held. Whenever the available car supply is such that all orders for cars can not be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:

1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.

2. Grouping of mines, or pooling of cars as between mines, will not be permitted.

3. On application of mine operators and in the discretion of the railroad, cars may be placed on such days

per cent. of its requirements, and its order shall be arbitrarily reduced to the number of cars furnished.

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. R'y Co.*, 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

11. If a mine receives more or less cars than it is entitled to during any period, as provided in Rule 6 (and after eliminating assigned cars as provided in Rule 9), it will be charged with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable.

12. A statement showing the car distribution for the preceding month will be furnished as soon as such distribution is ascertained, to such coal mines on this railroad as make application for the same. Such statement will show the car distribution of each mine, the total car distribution of each coal loading district, the aggregate distribution for all mines and all districts on this railroad, and the percentage of each such figure to the total.

W. G. CURREN,

General Superintendent Transportation.
Baltimore, Md., April 16, 1920.

(11) Notices of Petition for removal, with returns of service endorsed thereon, filed in open Court June 19, 1920, are in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA.

Lambert Coal Company vs. The Baltimore & Ohio Railroad Company.	In Chancery.

To Lambert Coal Company, Plaintiff:

You are hereby given notice that the defendant, The Baltimore and Ohio Railroad Company (in the proceeding in the above entitled cause called The Baltimore & Ohio Railroad Company) intends to file in the Circuit Court of Marion County, in the State of West Virginia, a petition and bond for the removal of the above entitled cause to the District Court of the United States for the Northern District of West Virginia; and that on the 19th day of June, 1920, said defendant will appear before the Honorable W. S. Hammond, Judge of said Circuit Court of Marion County, in the State of West Virginia, at the City of Fairmont, in the County of Marion, and State of West Virginia, and then and there present said petition and bond, and move said Court to accept said petition and bond and to approve said bond, and order the removal of said cause to said District Court of the United States. This notice is given to you as an ad-
(12) verse party prior to filing such petition and bond.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By GEO. M. HOFFHEIMER, Its Attorney.

HOFFHEIMER & TEMPLEMAN,
HENRY S. LIVELY,
Counsel for the Baltimore and Ohio

Railroad Company, Defendant and Petitioner.

Executed the witin notice, in Marion County, West Virginia, upon the within named Lambert Run Coal Co. on the 18th day of June, 1920, by delivering a true copy thereof in person to Dr. C. O. Henry, he being the President of said Corporation and a resident of said Marion County at the time of said service.

H. E. WOODWARD,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

Lambert Run Coal Company, a corporation, plaintiff,
vs.
The Baltimore and Ohio Railroad Company, a corporation, defendant. } In Chancery.

To Lambert Run Coal Company, a corporation, plaintiff, and Northern West Virginia Coal Operators Association, a corporation, intervening petitioner:

(13) You and each one of you are hereby given notice that the defendant, the Baltimore and Ohio Railroad Company, a corporation (in the proceeding in the above entitled cause called The Baltimore and Ohio Railroad Company) intends to file in the Circuit Court of Marion County, in the State of West Virginia, a petition and bond for the removal of the above entitled cause to the District Court of the United States for the Northern District of West Virginia; and that on the 19th day of June, 1920, said defendant will appear before the Honorable W. S. Haymond, Judge of said Circuit Court of Marion County, in the State of West Virginia, at the City of Fairmont, in the County of Marion, and State of West Virginia, and then and there present said petition and bond, and move said Court to accept said petition and bond and to approve said bond and order the re-

moval of said cause to said District Court of the United States. This notice is given to you as adverse parties prior to filing such petition and bond.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By HENRY S. LIVELY, Its Attorney.

HOFFHEIMER & TEMPLEMAN,
HENRY S. LIVELY,
Counsel for the Baltimore and Ohio Railroad Company, Defendant and Petitioner.

(14) Executed the within notice, in Marion County, West Virginia, upon the within named Lambert Run Coal Company, a corporation, on the 18th day of June, 1920, by delivering a true copy thereof in person to C. O. Henry, he being the President of said Corporation and a resident of said Marion County, at the time of said service.

T. V. BUCKLEY,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

Executed the within notice, in Marion County, West Virginia, upon the within named Northern West Virginia Coal Operators Association, a corporation, on the 18 day of June, 1920, by delivering a true copy thereof in person to Brooks Fleming, Jr., he being the president of said corporation, and a resident of said Marion County at the time of said service.

T. V. BUCKLEY,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

(15) Petition for removal filed in open Court, June 19, 1920, is in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company. } In Chancery.

To the Honorable the Judge of the Circuit Court of Marion County, West Virginia:

Your petitioner, The Baltimore and Ohio Railroad Company (in the proceedings in the above entitled cause called The Baltimore and Ohio Railroad Company) respectfully represents that the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000); that the value of the alleged right sought to be protected or gained by the plaintiff.

In this cause exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000); that the value which your petitioner will lose, if the said plaintiff succeeds in this cause, exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000); and that this petition is filed prior to the time the defendant is required by the laws of the State of West Virginia or the rules of the Circuit Court of Marion County, in the (16) State of West Virginia, to answer or plead to the bill of complaint filed herein.

Your petitioner further represents that this cause is a suit of a civil nature between Lambert Run Coal Company, as plaintiff, and your petitioner, The Baltimore and Ohio Railroad Company, as defendant.

Your petitioner, further represents that said Lambert Run Coal Company, the plaintiff, was at the time of the commencement of this suit, and at all times since has been and still is, a corporation duly incorporated and existing under the laws of the State of West Virginia, having its principal office in the City of Fairmont, in the County of Marion, and State of West Virginia, and was at the time of the commencement of this suit, and at all times since has been and still is, a resident and citizen of the State of West Virginia; that your petitioner, The Baltimore and Ohio Railroad Company, defendant, was at the time of the commencement of this suit, and at all times since has been and still is, a corporation duly in-

corporated and existing under the laws of the State of Maryland, having its principal office in Baltimore City, in said State of Maryland, and was at the time of the commencement of this suit, and at all times since has been and still is, a resident and citizen of the State of Maryland; that said Lambert Run Coal Company was not, at the time of the commencement of this suit, nor at any time thereafter, nor is it, a resident or citizen of any other State or place than said State of West Virginia; and that said The Baltimore and Ohio Railroad Com-
(17) pany was not, at the time of the commencement of this suit, nor at any time thereafter, nor is it, a resident or citizen of any other State or place than said State of Maryland.

Your petitioner further represents that this suit arises under the laws of the United States, to-wit: The Act to Regulate Commerce, approved February 4, 1887, as amended, and the "Transportation Act, 1920", approved February 28, 1920; that the alleged right of the plaintiff is based on, the correct decision of said suit necessarily involves and depends on, the construction of said Act to Regulate Commerce, as amended, and said "Transportation Act, 1920", and especially section 402 (10), (11), (12), (13), (14), (15), (16), and (17) of said "Transportation Act, 1920."

Your petitioner further represents that the Rule No. 8 in the bill of complaint mentioned, and from the observance and enforcement of which your petitioner is thereby sought to be enjoined was made, and was and is observed and enforced by your petitioner, under and in pursuance of, and in obedience to an order of the Interstate Commerce Commission of the United States, which order was issued by said Commission on the 15th day of April, 1920, a copy of which order is hereto annexed, made part hereof and marked "Petitioner's Exhibit A"; and the authority for said order was and is set forth in a report by said Commisison to the Sen-
(18) ate of the United States, a copy of which report is hereto annexed, made part hereof and marked "Petitioner's Exhibit B", that the said Rule No. 8 is in substance and fact an order of said Commission, and not a mere rule or regulation of your petitioner; that the validity, force and effect of said order of said commission, and of

said Rule No. 8 and of Rules Nos. 9 and 10 in the bill of complaint mentioned, and from the observance and performance of which your petitioner is hereby sought to be enjoined, necessarily involve and depend on, the construction and effect of said Act to Regulate Commerce, as amended, and said "Transportation Act, 1920", and especially section 402 (10), (11), (12), (13), (14), (15), (16) (17) of said "Transportation Act, 1920"; and that as your petitioner is informed and believes and therefore avers, all of the assignment and distribution of cars for the transportation of coal by your petitioner since the 16th day of April, 1920, was, has been and is in accordance with said statutes, said order of said Commission and said Rules Nos. 8, 9 and 10.

Your petitioner further represents that the object, purpose and effect of this suit and of said bill of complaint are in substance and in fact, to enjoin, set aside, annul and suspend the said order of the said Interstate Commerce Commission.

(19) Your petitioner further represents that the residence of the plaintiff, Lambert Run Coal Company, was at the time of the commencement of this suit, and at all times since has been and still is in the Northern District of West Virginia; that the said plaintiff had at the time of the commencement of this suit, and at all times since has had, and still has, its principal office and its operating office, in said Northern District of West Virginia; and that the matter complained of by the said plaintiff did and does arise in said Northern District of West Virginia.

Your petitioner has made and herewith files a bond, with good and sufficient surety, for its entering in the District Court of the United States for the Northern District of West Virginia, within thirty days from the date of filing this petition, a certified copy of the record in this suit and for paying all costs that may be awarded by the said District Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Written notice of the defendant's intention to file this petition and bond for removal was given the said plaintiff by the defendant, your petitioner, prior to filing the same, and was also given to Northern West Virginia Coal Operators Association, which, on the 17th day

of June, 1920, caused to be served on your petitioner a notice that it would present a petition of intervention in this suit, which notice is hereto annexed made part hereof and marked "Petitioner's Exhibit C", but which petition of intervention has not been presented or filed. (20) And your petitioner prays this Honorable Court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said District Court of the United States for the Northern District of West Virginia, and it will ever pray.

THE BALTIMORE AND OHIO RAILROD COMPANY,
By GEO. M. HOFFHEIMER, Its Attorney.

A. HUNTER BOYD, JR.,
H. R. PRESTON,
HOFFHEIMER & TEMPLEMAN,
HENRY S. LIVELY,
Counsel for the Baltimore and Ohio Railroad Company, Defendant and Petitioner.

STATE OF WEST VIRGINIA,
(21) County of Marion, to-wit:

Geo. M. Hoffheimer, being duly sworn, on his oath, says that he is the Attorney of The Baltimore and Ohio Railroad Company, a corporation, the petitioner named in the foregoing petition; that he has knowledge of the facts and allegations in said petition contained and is duly authorized to make this affidavit for and on behalf of said petitioner; that the facts and allegations in said petition contained are true, except so far as they are therein stated to be on information; and that so far as they are therein stated to be upon information he believes them to be true.

GEO. M. HOFFHEIMER.

Taken, subscribed and sworn to before me this 19th day of June, 1920.

CLARENCE CURREY,
Clerk of the Circuit Court of Marion County, West Virginia.

(PETITIONER'S EXHIBIT A.)

INTERSTATE COMMERCE COMMISSION
(22) Washington.

April 15, 1920.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, vs. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co.*," assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce act, as amended by Section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16,

(23) 1920, and until the further direction or order of the commission.

By the Commission:

GEORGE B. McGINTY, Secretary.

A True Copy:

GEORGE B. McGINTY, Secretary.

(PETITIONER'S EXHIBIT B).

(24) June 11, 1920.

IN RE ASSIGNMENT OF FREIGHT CARS.

By Senate Resolution No. 376 the Interstate Commerce Commission was directed to inform the Senate upon what authority, if any, its order of April 15, 1920, entitled "Notice to carriers and shippers" was issued.

Prior to 1907 it was a common practice for the railroads to deliver to coal mines cars privately owned or leased, foreign railway fuel cars and cars for the carrier's own fuel loading, accordingly as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal, and to refrain from counting or charging such cars against the distributive shares of the mines to which they were given. In other words, all such cars were given to the mines for which they were intended and such mines were given in addition their full share of the cars available for distribution. This practice was complained of as unreasonable and unduly prejudicial and in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, decided July 11, 1907, the Commission held that privately owned or leased cars, and foreign railway fuel cars sent on to the line by other railway companies for loading with fuel coal for the use of such other railway companies, should be given to the mines to which they were consigned or assigned but must be counted against the distributive shares of the mines, and that if such specially consigned or assigned cars equalled or exceeded the distributive share of a mine receiving them it should have no additional cars, and if the specially consigned or assigned cars did not equal the distributive share of the

mine to which given it should be given additional cars only sufficient to make up its distributive share.

In the report in this case it was pointed out that in *U. S., ex rel Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 165 Fed. 113, a similar decision was made as to private cars and a contrary decision as to foreign railway fuel cars, but that in *Logan Coal Co.* v. *Penn. R. R. Co.*, 154 Fed. 497, it was held that such foreign railway fuel cars should be counted against the mines to which they were consigned.

Among other considerations mentioned in the Commission's report was the fact that a railroad company would not send its cars on to the lines of another railway company even for its own fuel supply if they were to be diverted from that intended use and distributed among others than those to whom they were consigned for loading to various destinations on the lines of other carriers, thus rendering the fuel supply of the carrier sending the cars uncertain and depriving it of the use of its equipment.

In *Traer* v. *Chicago & Alton R. R. Co., et al.*, 13 I. C. C. 451, decided April 13, 1908, the same questions were presented that had been presented in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., Supra*, and the additional question of the reasonableness of the carrier's failing to count (25) against the mines to which they were delivered cars for loading with its own railroad fuel. The Commission followed the decision in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*, and in addition held that the cars used by carriers on their own lines for transportation of their own fuel supply may be given to the mine or mines from which such fuel supply is received, but that if such mine or mines also ship commercial coal fuel cars so supplied must be counted against the mine or mines under the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra.*

In this case it was said that if a contract for fuel covers such supply as the carrier reasonably needs for its current operation and a period of car shortage should come it could use its equipment to procure its fuel even though it thereby deprived shippers of desired use thereof; that this right to so use its cars did not rest

upon the ground of private contract but upon the public necessity that the railroad must have fuel; but that neither contract nor considerations of public policy which recognized the public necessity for fuel would justify the carrier during a period of car shortage in using its equipment for a superfluous supply of its own fuel when such equipment was demanded and needed by the shippers and the public. Recognizing the right of the carrier to secure its fuel supply either from mines which it owns or those the entire output of which it purchases, it was held that where the carrier purchases a portion of the output of a mine which is also producing commercial coal it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnished to that mine for its own fuel.

In *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I C. C. 86, decided June 2, 1908, the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra.*, was again followed, and it was said that the ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; that the ownership of a private car or the possession of a foreign railway fuel car gives to a coal operator no preferred right to have it occupy a carrier's sidings or tracks as against a system car loaded by another operator, or to have it handled in trains in preference to a system car, and that when any of these general facilities are insufficient to move all the traffic offered no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines.

In *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 435, decided January 10, 1910, the Supreme Court of the United States sustained the decision of the Commis-
(26) sion in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*, and in *Tracy* v. *Chicago & Alton R. R. Co., supra*, and held that the act to regulate commerce delegated to the Commission authority to determine on complaint the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage as a means

of prohibiting undue preferences and unjust discriminations.

In *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, 19 I. C. C. 356, decided March 7, 1910, the above decision of the Supreme Court was referred to in pointing out that the orders of the Commission with respect to the distribution of coal cars by interstate carriers remained unaffected by attacks that had been made upon them in the courts, and that further consideration of these questions in connection with this group of cases had confirmed the conviction that the general principles underlying the disposition made of previous cases were both sound and just. The rule applied by the carrier in the *Hillsdale case* was described, its effect was explained, and it was condemned as giving undue advantage in distribution to certain mines and as contrary to the previous decisions of the Commission. In a supplemental report in this case, 23 I. C. C. 186, reparation was awarded for damages resulting from the discrimination which had been practiced and found.

In *Penna. R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, decided June 21, 1915, the Commission's award of reparation in *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, *supra*, was sustained by the Supreme Court notwithstanding the fact that in action had been brought in a State Court on the same subject before the Commission had made its reward of reparation. The Supreme Court held that where a complaint involved practices of carriers in distributing cars for interstate shipments no action is maintainable in any Court for damages alleged to have been inflicted thereby until the Commission has made a finding as to the reasonableness of such practices.

In the Commission's report of June 9, 1914, to the Senate and House of Representatives in *Coal and Oil Investigation*, 31 I. C. C. 193, it said at page 218:

As to actual distribution of cars in accordance with the relative ratings of the mines, the opinion of the Commission is clearly set forth in *Trear* v. *C. & A. R. R. Co.*, 13 I. C. C. 451, and it was sustained by the Supreme

Court of the United States in 215 U. S. 452 and 479. Formerly few of the roads counted against the mine ratings company fuel cars (i. e., cars to be loaded with the carrier's own fuel); private cars (i. e., cars owned or leased by coal companies); or foreign consigned cars (i. e., car delivered by foreign coads for loading at particular mines.) In the case just cited, the Commission ruled that (27) all three classes of cars should be counted against the ratings as well as those furnished for commercial loading. In cases where the carrier takes the entire output of a mine, however, it has been considered permissible to deduct the number of cars delivered to that mine from the available supply before prorating among mines shipping commercial coal, or both commercial and railroad coal.

The Rule of law on this subject thus established remained the controlling rule for carriers generally, and apparently without friction or controversy, until during the war and under the rules of the Fuel Administration, including its zoning system, and while the roads were under federal control, the rule was changed and the use of assigned cars for loading with railroad fuel was abandoned. This change was followed by the imperative necessity of railroads resorting to confiscation of coal in transit in order to keep their roads in operation. In many instances the coal was confiscated at the mouth of the mine. Those familiar with these subjects are apparently unanimous in saying that the practice of confiscation is attended by more evils than is the practice of assigned cars for railway fuel.

When federal control terminated that was in effect on all roads under federal control a set of rules that had been formulated by the Railroad Administration after consultation with a committee of the National Coal Association, and in order that there might not be confusion because of different lines of action being followed by different individual roads the Commission on March 2, 1920, issued a notice to carriers and shippers recommending that until experience and study demonstrated that other rules would be more effective and beneficial the uniform rules as contained in the Railroad Ad-

ministration's Car Service Section Circular CS-31 (Revised) be continued in effect.

With the suspension of the activities of the Fuel Administration and regulations which he had prescribed some railroads, that did not have more than two or three days' supply of coal and that were and for some time had been securing their necessary fuel supply by confiscation at the mouth of the mines were sued for damages on account of such confiscation, injunctions were brought in State courts against the practice of confiscation, and when it was learned that the carriers were contemplating return to the use of assigned cars in injunctions were sought in State courts against the same carriers restraining them from using assigned cars. Numerous informal conferences were had between the Commission and representatives of the coal operators and representatives of the railroads in an effort to find some way by which the carrier could be assured of a fuel supply without the use of assigned cars or resort to confiscation. A con-
(28) ference was arranged between a committee representing the railroads and a committee representing the National Coal Association for the purpose of devising, if possible, some plan that would effect that purpose but no concrete or definite suggestions to that end resulted. Transportation conditions in the country were serious. Railroads that were unable to meet the demands upon them for transportation would be wholly unable to function if they could not secure coal and many of them had not more than two or three days' supply.

Rule 8 of the Railroad Administration's rules which the Commission had recommended be adhered to until experience and study demonstrated that some other rules would be more effective and beneficial was as follows:

8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

It will be noted that under this rule private cars, some of which are owned and used by coal operators, and

cars assigned to the mines by the Car Service Section of the Railroad Administration for railroad fuel or for other purposes were designated and treated as "assigned" cars. All other cars were designated and treated as "unassigned" cars.

Rules 9 and 10 of the Railroad Administration's rules were as follows:

9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rate share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rate share, based on a revised percentage it shall be entitled to receive unassigned cars in addition thereto to make up its pro rate share.

It will be noted that under these rules the "assigned" cars were treated in the same manner as railway fuel cars were treated under the Commission's decisions in the cases hereinbefore cited.

Under the conditions that have been briefly outlined the Commission on April 15, 1920, changed its rec-
(29) ommendation of March 2, 1920, and recommended that until further experience and study demonstrated that other rules will be more effective and beneficial the Railroad Administration's rules be continued in effect except that rule 8 should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Tracy* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission also expressed the opinion that an

emergency existed requiring immediate action and in the exercise of the authority conferred by paragraph (15) of Section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, it suspended the operation of the then existing rule 8 and directed the observance of rule 8 modified as above, effective April 16, 1920, and until further direction or order of the commission.

Paragraph (12) of Section 1 of the interstate commerce act, as amended by Section 401 of the Transportation Act, 1920, declares it to be the duty of every carrier by railroad to make just and reasonable distribution of cars for the transportation of coal among the coal mines served by it whether located on its line or lines or customarily dependent upon it for car supply, and to maintain and apply just and reasonable ratings of such mines during any period when the supply of cars available for such service does not equal the requirements of the mines, and to count each and every car furnished to or used by any such mine for transportation of coal against the mine, and provides a specific penalty for failure or refusal to comply with these requirements.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 400 of the Transportation Act, 1920, provides that charges made for any service rendered or to be rendered by carriers subject to the act shall be just and reasonable. The act does not attempt to define in detail what is a just and reasonable rate, fare or charge, or what is a just and reasonable distribution of cars or rating of mines. The Commission is authorized to determine what is a just and reasonable charge for transportation or what are just and reasonable rules for distribution of cars or rating of mines.

Paragraph (15) of Section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, authorizes the Commission whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action ex-
(30) ists in any section of the country, to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission, and to make such just and reasonable directions with respect to car

service as in its opinion will best promote the service in the interest of the public and the commerce of the people. The Commission's direction of April 15, 1920, was issued under authority of that paragraph.

The Commission is of opinion that paragraph (12) of section 1 of the interstate commerce act does not change the rule of law laid down in the *Hocking Valley* and *Tracy cases, supra*. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States.

No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than that laid down by the Commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under federal control and the production distribution and marketing of coal was under a war time federal administration. The passing of the roads from federal control and the suspension of the operation of the Fuel Administration's rules, together with the transportation conditions and shortage of fuel on hand, created an emergency in which the Commission acted in accordance with its best judgment. Both before and since that action was taken parties interested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adapted to their uses which can fairly be substituted for the rules to which some objections have been made. No one has suggested such a substitute rule. The nearest approach to it has been an expressed belief that a form of preferential contract could be devised under which the contracting railroad would have first call upon the output of a mine but so far as we are advised no such form of contract has been framed. It seems not inappropriate to say that the coal operators are not able to entirely agree among themselves as to the advantages or disadvantages of the assigned car practice.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the Transporta-

tion Act, 1920, authorizes the Commission to direct priorities in transportation. If priorities were to be prescribed in transportation of bituminous coal it would obviously be necessary to give first priority to that for railway fuel, as was done when priorities were issued by the President's priority agent during the war.

(31) Copies of United States Railroad Administration's Car Service Section Circular CS-31 (Revised) and of the Commission's direction of April 15, 1920, are appended hereto and made a part hereof.

(PETITIONER'S EXHIBIT C).

IN THE CIRCUIT COURT OF MARION COUNTY,
(32) WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
Baltimore & Ohio Railroad Company, Defendant.
In Equity. No. ———

NOTICE.

To the Defendant:

Please take notice that on the 19th day of June, 1920, at ten o'clock in the forenoon, or as soon thereafter as the matter may be heard, the Northern West Virginia Coal Operators Association, a Corporation, wiill present its petition in the above styled cause to the Honorable W. S. Haymond, Judge of said Court, in chambers at the Court House at Fairmont, West Virginia, praying that it may intervene in the said suit and that an order may be entered making it a party thereof.

NORTHERN WEST VIRGINIA COAL
OPERATORS ASS'N,
By GEO. T. BELL.

(33) The Removal Bond filed in open Court June 19, 1920, is in words and figures following:

Know all Men by These Presents,

That we, The Baltimore and Ohio Railroad Company, a Corporation, as principal, and National Surety Company, a Corporation, as surety, are held and firmly bound unto Lambert Run Coal Company, a Corporation, in the penal sum of One Thousand Dollars, to the payment whereof well and truly to be made unto the said Lambert Run Coal Company, its successors, representatives and assigns, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Whereas, The Baltimore and Ohio Railroad Company has filed its petition in the Circuit Court of Marion County, in the State of West Virginia, asking for the removal to the District Court of the United States for the Northern District of West Virginia of a certain cause, wherein Lambert Run Coal Company is plaintiff, and the Baltimore and Ohio Railroad Company is defendant.

Now, the Condition of the Above Obligation is Such, that if the said The Baltimore and Ohio Railroad Company shall enter in the said District Court of the United States for the District aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in said suit, and well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was improperly removed thereto, and shall do and perform all acts (34) required by the laws of the United States to be done by it in the removal of said suit as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue.

In Testimony Whereof, the said The Baltimore and Ohio Railroad Company hath caused this bond to be duly executed by George M. Hoffheimer, its Attorney in fact, and said National Surety Company, by Henry S. Lively, and F. E. Nichols, its Attorneys in fact, hath hereto set its hand and seal on the nineteenth day of June, 1920.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By GEORGE M. HOFFHEIMER, Seal
Attorney-in-fact.

NATIONAL SURETY COMPANY,
By HENRY S. LIVELY.
By F. E. NICHOLS,
Its Attorneys-in-fact.

STATE OF WEST VIRGINIA,
(35) County of Marion, ss:

I, Clarence Currey, Clerk of the Circuit Court in and for the County of Marion, in State aforesaid, hereby certify that the foregoing are true and correct copies of all papers filed, and all orders entered by said Circuit Court in the Chancery cause of Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railorad Company, Defendant, as taken from the records and papers on file in my office.

Given under my hand and the seal of said Court this 21st day of June, 1920.

CLARENCE CURREY,
Clerk of Circuit Court of Marion County, West Virginia.

Taxation of cost, 26.40
Clerk's Fee for Transcript, $14.50

(Seal)

ORDER DOCKETING RECORD FROM CIRCUIT COURT OF MARION CO.

(36) Entered June 29, 1920.

Lambert Run Coal Company
v.
The Baltimore & Ohio Railroad Company. } In Equity.

This day came the defendant, The Baltimore & Ohio Railroad Company, by H. R. Preston, A. Hunter Boyd, Jr., and Hoffheimer & Templeman, its counsel, and tendered and asked leave to file the transcript of record of the Circuit Court of Marion County, West Virginia. On consideration whereof it is ordered that said transcript of record be, and the same is hereby, filed, and that this cause be, and the same is hereby, docketed at Philippi.

AFFIDAVIT OF SAMUEL D. BRADY.

In the Circuit Court of Marion County,
State of West Virginia.

Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendant.	In Equity No. ——

State of West Virginia,
(37) Marion County, ss:

This day personally appeared before me, the undersigned, a Notary Public in and for the County and State, aforesaid, Samuel D. Brady, who by me duly first sworn, deposes and says:

That affiaint is the President of Osage Coal Company, a mining corporation created and existing under the laws of the State of West Virginia; that said company is engaged in producing bituminous coal and that its mines are situation in Monongalia County, West Virginia, on the railroad line of the Morgantown & Wheeling Railway Company which is being operated under a receivership; that said railroad extends from Morgantown, West Virginia, for a distance of about thirty (30) miles to the village of Brave, in the State of Pennsylvania, and is a common carrier engaged in the transportation of freight and passengers by continuous carriage or shipment wholly by railroad between different points in the State of West Virginia and other points in the different States of the United States; that said railroad has a physical connection at Randall, in said Monongalia County with the railroad line of the Monongahela Railway Company, and between Randall and said village of Brave, is operated as a steam railroad and does not have a physical connection with any line of railroad other than the line of said Monongahela Railway Company at Randall.

Affiant further says that said Monongahela Railway Company operates a line of railroad extending from Brownsville, Pennsylvania, to Fairmont, West Virginia, along the west bank of the Monongahela river, a distance

of approximately sixty-nine (69) miles; that said Monongahela Railway Company is a railroad corporation, created and existing under the laws of the State of Pennsylvania and is a common carrier in the transportation of freight and passengers by continuous carriage wholly by railroad between different points in the States of (38) West Virginia and Pennsylvania and other points in the different States of the United States; that the railroad of said Monongahela Railway Company has physical connections at West Brownsville Junction in Pennsylvania with the railroad of Pennsylvania Railroad Company and the railroad of Pittsburgh & Lake Erie Railroad Company, and upon information and belief that the lines and property of said Monongahela Railway Company are owned jointly and in equal interests by Pennsylvania Railroad Company and New York Central Railroad Company or come of its underlying companies, and are at this time being operated by interests which are owned and controlled by the New York Central Railroad Company and Pennsylvania Railroad Company.

Affiant further says that neither the Morgantown & Wheeling Railway Company nor Monongahela Railway Company has any coal cars of its own and that each of said companies is customarily dependent upon said Pennsylvania Railroad Company, Pittsburgh & Lake Erie Railriad Company and New York Central Railroad Company for its coal car supply; that the mines of Osage Coal Company are situated at or near Osage, West Virginia, on the railroad line of said Morgantown & Wheeling Railway Company only, about one (1) mile from said Randall; that between said Randall and the village of Cassville on the said railroad and within distance of four (4) miles, there are twenty-six (26) operating coal mines (twenty-two of which are given mine ratings by said Morgantown & Wheeling Railway Company), situated on said railroad line including the mines of said Osage Coal Company; that the coal mined by said company is substantially of the same quality and character and is mined and shipped under substantially similar circumstances and conditions, physical and otherwise as exist throughout the said mining district between said Randall and Cassvile, and that the logical market for said coal is the same as that for other coal mined in said dis-

trict and coal produced from mines on said Monongahela Railway.

Affiant further says that said Monongahela Railway Company, its said owners and connections, receive the coal produced at the mines of Osage Coal Company for shipment to points on their respective lines and to various points on connecting railroad lines and for shipment to various other points in the different States of the United States; that said Osage Coal Company is prepared and equipped to produce, ship and sell its coal in the various markets of the United States reached by the railroad lines of said Morgantown & Wheeling Railway Company, Monongahela Railway Company and its said (39) owners, Pennsylvania Railroad Company, Pittsburgh & Lake Erie Railroad Company and the New York Central Railroad Company and their Railroad connections to the amount of one thousand (1,000) tons per day and that the railroad of said Morgantown & Wheeling Railway Company in connection with the lines of said Monongahela Railway Company, Pennsylvania Railroad Company, Pittsburgh & Lake Erie Railroad Company and New York Central Railroad Company is the only outlet or means of shipment or transportation from said mines.

Affiant further says that for many months last past there has existed and now exists an acute shortage of coal cars on the railroad of said Morgantown & Wheeling Railway Company, and that as a result thereof the said mines of said Osage Coal Company have been operated since January 11, 1920, to no more than approximately 25 per sent of their capacity as rated by said Morgantown & Wheeling Railway Company; that affiant has read and knows the content of the bill of complaint filed in the above entitled cause and says that the facts therein set forth with reference to the results and effect of coal car shortage and of assigning cars during coal car shortage periods are true.

Affiant further says that said Morgantown & Wheeling Railway Company has established and maintains mine ratings for the said 22 mines located on its line and that the following table shows for the periods indicated therein the percentage of cars available for coal loading on the line of said Railway based upon its said ratings of

said mines for said periods respectively, also the percentage of coal cars furnished by said railway company during said periods to the mines of said Osage Coal Company and to four other mines belonging to and operated by other coal mining companies located on the line of said Railway; that all of said mines shown in said table are served by said Railway Company only and are entirely dependent upon it for car supply, and that all of the mines included in said table other than the mine of the said Osage Coal Company have been receiving assigned cars during all the time covered by said table but in less proportion prior to the month of April, 1920, than during and since said month, but that said mines of said Osage Coal Company have not during any of the time covered by said table receiveed any assigned car or cars whatsoever:

(40) #4—SS.

Morgantown and Wheeling Railway Company	Percentage received for period Jan. 11 to Feb. 10, 1920, inclusive	Percentage received for period Feb. 11 to March 10, 1920, inclusive	Percentage received for period March 11 to April 10, inclusive	Percentage received for period April 11 to May 10, inclusive	Percentage received for period May 11 to June 10, inclusive
Morgantown & Wheeling Railway mines	43.70	30.46	45.20	29.05	27.76
Osage	39.94	26.96	41.08	12.24	16.50
Cleveland and Morgantown, No. 2	38.90	33.11	66.68	44.13	51.50
Berry	52.30	32.28	57.76	44.18	43.01
Mammoth	46.15	30.93	55.82	73.27	39.64
Chaplin	55.93	23.55	51.62	48.53	45.54

And further affiant sayeth not.

SAMUEL D. BRADY.

Taken, subscribed and sworn to before me in Marion County, State of West Virginia, this 18th day of June, 1920.

TUSCA MORRIS,
Notary Public for Marion Co., W. Va.

My Commission expires December 23, 1929.

AFFIDAVIT OF BROOKS FLEMING, JR.

WEST VIRGINIA.
IN THE CIRCUIT COURT OF MARION COUNTY,

Lambert Run Coal Company, Plaintiff; vs. The Baltimore and Ohio Railroad Company, Defendant.	In Equity. No. ———

STATE OF WEST VIRGINIA,
(41) Marion County, ss:

This date personally appeared before the undersigned Notary Public, Brooks Fleming, Jr., who being first duly sworn, says upon his oath:

That he is a resident of the City of Fairmont, in the State aforesaid, and has resided in said City of Fairmont for the last thirty-six (36) years; that continuously from the year 1906 up to the present time he has been and still is engaged in the coal mining business, and during all of said period has been connected with the Consolidation Coal Company, which owns and operates a large number, to-wit, eighty-one mines located in the States of West Virginia, Maryland, Pennsylvania and Kentucky, and that during all of the past sixteen years said The Consolidation Coal Company has owned and operated a large number of mines, lying in some or all of the said States; that said mines are located on various lines of Railroad including the Baltimore and Ohio Railroad Company, defendant above named; that fifty-one of said mines now owned and operated by the said The Consolidation Coal Company are located on the lines of the defendant, Baltimore and Ohio Railroad Company; that affiant has been active in the operation of various mines belonging to the said The Consolidation Coal Company as day laborer, foreman mine superintendent, assistant manager of the West Virginia Division of said coal Company which included within its jurisdiction a large number of mines, Assistant General Manager of said Com-
(42) pany, in which position he had to do with the operation of eighty-one mines; and that at the present time affiant is Assistant to the President of the said The

Consolidation Coal Company and is thoroughly familiar with the operation of the mines of said Coal Company, and the relationship of said mines to the carriers and has had a large experience in the operation of said mines during car shortage period and knows the effect upon the property, business, good will and employees of the company occasioned by car shortage and assigned cars; that the Northern West Virginia Coal Operators' Association is a voluntary corporation, organized and existing under and by virtue of the laws of the State of West Virginia, its principal office located in the City of Fairmont, County and State aforesaid; that affiant is President of said Association and is duly authorized by said Association to make this affidavit on its behalf as its President; that among the objects and purposes for which said Association is formed is the following: "The establishment and maintenance of proper relations between common carriers and coal producing companies, the procurement of an adequate car supply and the equitable distribution thereof, and the ascertainment of facts and the compilation and distribution of data and statistics relating to railroad transportation affecting production;" and that the activities of this affiant and of the said Association in this behalf are undertaken in accordance with the said objects and purposes of said Association.

Affiant also states that he is familiar with the practice of assigning cars fully set forth in bill of complaint to be filed herein; that affiant has read and knows the contents of said bill of complaint and knows the facts set forth therein are true, except those facts therein said to be upon information and belief and the facts therein alleged which have to do with the property and business of the plaintiff, as to which facts affiant believes them to be true; that affiant is familiar with the mining property (43) belonging to the plaintiff and described in the bill of complaint filed herein.

Affiant says that the following are some of the injuries and injustices occasioned by the assigned car: The assigned car prevents equal distribution of transportation facilities among all coal operators, thus penalizing operators not having contracts subject to assigned cars and causing them loss in the following particulars,

Their production is reduced, resulting in higher cost of production per ton of coal.

The assigned car in many cases prevents the coal operator not having contracts that can be filled by the use of assigned cars from carrying out said contracts with his customers, which results in injury to his reputation and business and loss of business standing.

The assigned car produces unrest and discontent among the miners in those mines not enjoying the use of assigned cars, resulting in men leaving such mines to the loss and injury of the operator and great damage to his business.

The assigned car also occasions heavy expense in endeavoring to secure new miners, and takes from the mines those men most desirous of working full time and earning good wages. During acute car shortage periods when assigned cars are used to the greatest extent, miners employed at mines not enjoying assigned cars are unable to make sufficient wages to afford themselves and families a decent living.

And further affiant sayeth not.

BROOKS FLEMING, JR.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 15th day of June, 1920.

A. E. THURNES,
Notary Public.

My Commission expires July 28, 1929.

AFFIDAVIT OF CLAUDE M. STUBBINS.

IN THE CIRCUIT COURT OF MARION COUNTY,
STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendant.	In Equity No. ———

STATE OF WEST VIRGINIA,
Marion County, ss:

This 14th day of June, 1920, personally appeared before the undersigned Notary Public, Claude M. Stubbins, who being first duly sworn, says, upon his oath:

That he is a resident of the City of Fairmont, County and State aforesaid, and is employed by the Northern West Virginia Coal Operators' Association as Chief Clerk; that in the performance of his regular duties he obtains from a large number, to-wit, thirty (30) bituminous coal operators owning and operating, to-wit, sixty-nine (69) mines located on the lines of the defendant and the Western Maryland Railroad Company in Marion County, Taylor, Harrison and Barbour County, State of West Virginia, daily reports showing the cars received, loaded and left over on each day at each of the said mines and also the number of cars desired by each of the said mines for loading on the following day; that by arrangements made between the agent of the defendant having in charge defendant's coal car distribution in this territory and living in the City of Grafton, Taylor County, West Virginia, and the officers of the said Northern West Virginia Coal Operators' Association, the coal operators above mentioned make their said daily reports to this affiant with reference to requirements of said operators for cars for the following day instead of making those reports direct to the agent of the defendant at Grafton and that affiant thereupon daily, after receiving said reports from said operators, communicates with the said agent of the defendant at Grafton and advises said agent of the requirements of said coal operators as aforesaid; that affiant became connected with said Northern West Virginia Coal Operators' Association on the 15th day of February, 1920, when he found the practice above described in affect and has continued to make said reports daily since said date.

(45) Affiant further says that the defendant customarily publishes monthly bulletins having to do with the distribution of cars for coal loading and mine ratings and that said bulletins are usually received by affiant and coal operators requiring them about the 20th day of the month of issue; that the current number of said bulletin

issued by the defendant for its Eastern Lines is called "Bulletin No. 4", and is entitled "Distribution of Cars for Coal Loading, April, 1920, and Mine Ratings Effective May 10, 1920", and is dated Baltimore, Md., May 15th, 1920, and bears the name "W. G. Curren, Gen'l Sup't Transportation"; that said bulletin is printed and distributed by defendant to and among coal operators and others; that the ratings therein shown as effective May 10, 1920, continued in effect in accordance with the regulations and practices of the defendant until and including the tenth (10th) day of June, 1920; that the similar circular of the defendant giving the distribution of cars for coal loading in May, 1920, and the mine ratings in effect June 10, 19201, has not yet been received by affiant; that the mine ratings shown by the bulletins of defendant very but little from month to month, and that the ratings shown in the said "Bulletin No. 4", are approximately the same as the ratings for the said mines which became effective June 10th, 1920; that the daily rated capacity of all the mines located within the jurisdiction of said agent at Grafton as shown by said "Bulletin No. 4" is 1559.1 cars, and that the rating shown by said "Bulletin No. 4" of the Rachel Mine of the Consumers Fuel Company, located on and served exclusively by the defendant's line and within said jurisdiction, at Downs, Marion County, State of West Virginia, is 43.1 cars, and that the ratings for said mine on the 12th day of June, 1920, was according to the best of the knowledge and belief of this affiant, approximately 43.1 cars; that on said day, affiant was advised by the agent of said Rachel Mine, who was then making his regular daily report as such agent to this affiant, that the defendant on said day had placed at said Rachel Mine for loading from its tipple and storage 83 cars, 75 of which were consigned to the defendant and 8 of which were consigned as commercial coal to other consumers.

That in accordance with arrangements made between the said Northern West Virginia Coal Operators' Association and the defendant's said agent at Grafton, West Virginia, said agent at Grafton reported to affiant on Saturday, June 12, 1920, that 744 coal cars were on said (46) date in the region under the jurisdiction of the said agent at Grafton and that 664 of said cars had been, at

or prior to 7 o'clock A. M. on that day, placed for loading at mines served by the defendant under the jurisdiction of said agent; that eliminating the number of assigned cars loaded by defendant within said jurisdiction on said date, the car supply in said jurisdiction available for commercial loading on said date was approximately 11 per cent of the rated capacity of the mines located on defendant's line within said jurisdiction; that on said date two mines belonging to the Jamison Coal and Coke Company, located at Downs, West Virginia, within said jurisdiction and on the lines of the defendant and served by it only, having rated capacities respectively according to said "Bulletin No. 4" of 10.8 cars and 12.7 cars per day, received no car or cars for coal loading and that the requirements of each of said mines for said day, which requirements had been duly previously reported by affiant to said agent of the defendant at Grafton, were for cars up to the full rated capacity of said mines respectively.

And further affiant sayeth not.

CLAUDE M. STUBBINS.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 14 day of June, 1920.

J. BLAINE MOORE,
Notary Public for Marion County, West Virginia.

My Commission expires Aug. 15, 1927.

AFFIDAVIT OF CLETUS H. JENKINS.

(47) IN THE CIRCUIT COURT OF MARION COUNTY, STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore & Ohio Railroad Company, Defendant.
In Equity No. ———

STATE OF WEST VIRGINIA,
County of Marion, ss:

This 15th day of June, 1920, personally appeared before me the undersigned Notary Public, Cletus H. Jenkins, who being first duly sworn, says upon his oath:

That he resides in the City of Fairmont, county and State aforesaid, and that for more than twenty-three (23) years last past he has resided in the said City of Fairmont and has been engaged in the business of operating coal mines and selling the product thereof; that he is Vice-President of the Logan Mining Company operating bituminous coal mines in Logan County, State of West Virginia, and Secretary and Treasurer of the Hutchinson Coal Company operating bituminous coal mines in Harrison and Mason Counties, State of West Virginia, and Belmont County, State of Ohio; that in the year 1918 the Northern West Virginia Coal Operators' Association was organized and immediately upon its organization affiant became President of said Association, which position he occupied for more than one year; that in his experience in the coal business he has worked in the mines and on the surface and has engaged both in the operating and selling end of the business; that for many years he has been and now is familiar with the relationship between supply of cars for the transportation of coal and the operation of the mines dependent upon such car supply; that there has been a coal car shortage on the lines of the defendant, The Baltimore and Ohio (48) Railroad Company, during a considerable portion of each calendar year beginning with the year 1916 up to and including the present time; that during the years 1916 and 1917 and up until about the 25th day of May, 1918, the said defendant made a practice of assigning coal cars to certain mines substantially in accordance with the provisions relating to assigned cars contained in Exhibit "A" attached to the bill of complaint filed herein and made a part of said bill; that beginning on or about April 16, 1920, the said defendant again resumed the practice of assigning cars; that the result of this practice is to give to the mines receiving the assigned cars a larger percentage of cars for the movement of coal on each car shortage day on which assigned cars are placed

at said mine than said mine would receive were cars distributed to all mines in proportion to the respective ratings of said mines; that a further result of the practice of assigning cars is to deprive mines that do not receive assigned cars of their full proportion, based upon their respective ratings, of the cars available on each and every day on which cars are so assigned; that affiant has read the bill of complaint in the above styled cause and that the facts therein stated are, to his personal knowledge, true, except in so far as facts therein stated are alleged therein to be upon information and belief and that insofar as they are therein so stated he believes them to be true, except the facts alleged in the said bill pertaining to the actual experience and business of the plaintiff herein, at its own mine mentioned in the bill and as to those allegations affiant believes them to be true.

(49) Affiant further alleges and states that to his own knowledge the unlawful acts and practices alleged by the said plaintiff to have been done and performed by the said defendant in dealing with the said plaintiff are done and performed habitually and as a matter of practice by the said defendant in its dealings with a large number of other coal mining companies whose operations are located upon said defendant's lines, both within and without the State of West Virginia, and which coal mining companies are dependent upon said defendant for their car supply and with like effects and results.

And further affiant sayeth not.

CLETUS H. JENKINS.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 15th day of June, 1920.

J. BLAINE MOORE,
Notary Public.

My Commission expires Aug. 15, 1927.

AFFIDAVIT OF JAMES M. ORR.

IN THE CIRCUIT COURT OF MARION COUNTY,
(50) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore & Ohio Railroad Company, Defendant.
In Equity No. ———

STATE OF WEST VIRGINIA,
Marion County, ss:

On this 15th day of June, 1920, personally appeared before the undersigned Notary Public, James M. Orr, who being first duly sworn, says upon his oath:

That he is a resident of the City of Clarksburg, County of Harrison, State of West Virginia, and is Vice-President and General Manager of the Hudson Coal Company, a West Virginia corporation engaged in the mining of bituminous coal; that affiant has been engaged in the mining of coal in the State of West Virginia continuously for the past twenty-three (23) years; that affiant is a graduate of the School of Mines and Mining of the University of the State of West Virginia and is a mining engineer by profession and has personally engaged in practically all the various kinds of work necessary to the production of coal; that affiant has been a mine superintendent, mine engineer and mine manager and has engaged in no other lines of endeavor than that of bituminous coal mining within the State of West Virginia for the past twenty-three (23) years; that affiant has read the bill of complaint in the above entitled cause and knows the contents thereof and states that the facts set forth in said bill of complaint with reference to car shortage, the assignment of cars at coal mines and the results thereof are true, except as to the facts therein alleged upon information and belief and as to the facts therein alleged with reference to plaintiff's said mine, and as to all such facts affiant believes them to be true.

Affiant further says that the said Hudson Coal Company owns and operates four mines, all of which are located on the lines of the defendant, the Baltimore & Ohio Railroad Company, and are served by it exclusively; that two of the said mines are located in said Marion County, viz., Tucker mine and Betty mine, and that two of said mines are located in the County of Harrison, State of
(51) West Virginia, viz., Miller Mine and Lewis mine;

that said Tucker, Betty and Lewis mines are comparatively new, having been opened up in the past two years and are still in a state of development; that affiant is thoroughly familiar with all the conditions surrounding the operation of the aforesaid mines and with bituminous coal mine operating conditions in general and with the relationship between coal mines and the line of railroad serving them; that the said Hudson Coal Company at no time during the year 1920 has received or loaded any assigned cars at either the said Miller Mine or the said Lewis mine; that "Bulletin No. 4" issued by the defendant, entitled "Distribution of Cars for Coal Loading, April, 1920, and the Mine Ratings Effective May 10, 1920", gives a rating of 5.9 cars per day to said Miller mine, 7 cars per day to said Lewis mine, 6.6 cars per day to said Tucker Mine and 2.3 cars per day to said Betty mine; that during the Month of March, 1920, and prior to the date that the defendant began generally to assign cars in this territory, the said Hudson Coal Company entered into contracts with carriers other than the defendant for railway fuel supply which contracts call for the delivery of an aggregate of about seven (7) cars of coal per day from said Tucker and Betty mines; that thereafter and on or about the 7th day of May, 1920, the defendant began to assign cars to the said Tucker and Betty mines, for the transportation of coal sold under said contracts and that assigned cars have been set into said mines practically on each and every working day since said date; that neither of said contracts contins any provision whatsoever concerning assigned cars and that said cars assigned to said mines by the defendant have been assigned by it without any arrangement, agreement or understanding therefor between the defendant and the said Hudson Coal Company; that affiant and the said Hudson Coal Company are opposed to assigned cars.

Affiant further says that said Miller and Lewis mines are approximately three miles apart and that lying between said Miller and Lewis mines are six other mines operating the same vein of coal and under substantially similar circumstances and conditions; that the mines of the said Hudson Coal Company are at all times in active competition with the said other six mines and with all other mines located in Northern West Virginia and to a

very large extent with all other bituminous coal mines in the State of West Virginia and continguous States producing coal; that the said eight mines being so near to-
(52) gether depend to a very large extent upon the same source of labor supply; that the laborers working in the said eight mines live along the line of the one electric railway line serving that general territory; that three of the said six other mines are operated by the Long Coal Mining Company which Company ever since the method of assigning cars was generally re-established in this territory has sold and now sells its entire output to different railway companies, including, during the early part of said period, the defendant and has enjoyed and now enjoys at said mines the use of assigned cars and that during said period said three mines have run practicallly full time each and every working day; that affiant rides by the said three mines daily going to and from his place of business and has seen on practically every day for more than thirty (30) days last past at each of the said three mines operated by said Long Coal Mining Company empty coal cars standing behind the tipples after the day's work was completed; that affiant has seen on numerous occasions at different of said mines as many as five or six cars standing over empty at the end of the day's work; that since the first day of May, 1920, the said Miller mine of the said Hudson Coal Company has not had a full day's run except on May 10th and May 17th and that since said first day of May said Lewis mine has had but one full day's run, viz., on May 18th; that the percentage of cars supplied to said Miller mine by the defendant from April 16th to June 15th, inclusive, was 38 per cent and to said Lewis mine 36 per cent and that on no day during said period has any car been left over empty at either of said mines1 that because of the assignment of cars to said mines operated by said Long Coal Mining Company which assignment of cars enables said mines to operate practically full time, the best miners living in this district available to the eight mines aforesaid, the miners who are most anxious and able to work full time, have left the employ of the said Hudson Coal Company and have gone into the employ of the said Long Coal Mining Company and that with very few exceptions the miners remaining in the employ of the said Hudson Coal

Company, because of the irregularity of the employment afforded by that company and because of broken running time and the fact that the said Miller and Lewis mines are closed down for a whole day or more at a time, are the less efficient and less desirable miners; that the said Hudson Coal Company owns a large number of miners houses intended for the use and occupancy of its miners and that (53) because of the conditions hereinabove recited miners formerly in the employ of the said Hudson Coal Company and living in the said Company's houses have left the employ of the said Hudson Coal Company and gone into the employ of the said Long Coal Mining Company but refuse to vacate the houses belonging to the said Hudson Coal Company.

Affiant further says that in his experience as a coal mining engineer and in his study of problems connected with the operation of coal mines, he has come to the belief and states the fact to be that the assignment of cars to coal mines results in great economic abuses such as waste of transportation facilities, disturbance of labor conditions, broken running time of the mines, and all the other effects and evils set forth in said bill of complaint; that under ordinary operating conditions, when there is an abundant supply of bituminous coal, it is unprofitable and uneconomic to attempt to operate a bituminous coal mine for any number of hours substantially less than a full days working time, and mines, are not so operated, but that because of the shortage of coal throughout the United States the said Hudson Coal Company and affiant, as its General Manager, have deemed it necessary to operate the mines of said company for whatever period of time each day it was possible to operate the mines even though the operation was for only one or two hours; that the result of operating said mines on broken time is greatly to decrease the efficiency of the operating company's organization and increase its cost per ton of production, and that the operation of the mines of said Hudson Coal Company and of all other coal companies on broken time would not be justified, economically, commercially or otherwise were it not for the fact that coal operators feel in duty bound to exert themselves to the utmost in order to supply the great demand for coal now existing because of the acute shortage thereof.

Affiant further states that said Miller and Lewis mines are approximately thirty (30) miles from the said Tucker and Betty Mines and all four of said mines are located on the Mononagh Division of the defendant, and that though said four mines are entitled to the same percentage of cars for the transportation of coal, the defendant since the date on or about which it began to assign (54) cars to said Tucker and Betty mines, viz., May 7, 1920, has given said Tucker mine a 60 percentage car supply and said Betty mine a 56 per cent car supply, based on the said ratings for May, 1920, whereas during the same period and on the same basis said Miller mine has received a car supply of only 40 per cent and said Lewis mine only 38 per cent; that only two cars have been loaded at said Tucker mine with commercial coal during said period and none at said Betty mine; that during said period the said Tucker and Betty mines have been idle only one full day each while said Miller mine has been idle thirteen full days and said Lewis mine eleven full days.

And further affiant sayeth not.

JAMES M. ORR.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 15th day of June, 1920.

J. BLAINE MOORE.

My Commission expires Aug. 15, 1927.

AFFIDAVIT OF JAMES H. ALLPORT.

IN THE CIRCUIT COURT OF MARION COUNTY,
(55) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. Beltimore & Ohio Railroad Co., Defendant.	In Equity No. ———

STATE OF PENNSYLVANIA,
Cambria County, ss:

James H. Allport, being first duly sworn, deposes and says that he resides at Barnesboro, Cambria County, Pennsylvania, has been actively connected with the management and operation of bituminous coal mines since the year 1896. Affiant further states that since the year 1893 he has also been in active practice as a civil and mining engineer, and during that period he has acted as consulting engineer for the Huntington & Clearfield Telephone Company, Northern Cambria Street Railway Company, New York Mining & Manufacturing Company, Clinchfield Coal Corporation, Colonial Coal & Coke Company, Wise Coal & Coke Company, Old Dominion Power Co., Bickford Fire Brick Company, Kemmerer Coal Company, Oak Hill Coal Co., Superior Fuel Company, Crescent Refractories Company and other mining, manufacturing and public utility companies.

Affiant further states that as a consulting engineer he has established systems of cost, accounting for mining and manufacturing and public utility companies, and has been employed to report and appraise on bituminous coal properties both developed and undeveloped and to make recommendations for the development of such (56) properties, all of which work necessarily includes and involves the estimating of the cost of producing coal at such properties, and that he has made many such reports, recommendations and appraisals.

Affiant further states that on January 15th, 1918, he became a member of the Engineers' Committee of the United States Fuel Administration, the other members of said Committee being R. V. Norris and Cyrus Garnsey, Jr., and that he held this position until December 13th, 1919. The duties of said Engineers Committee included a study of the costs of all coal mining operations in the United States with the exception of those which were too small to be required to report their costs, and said Committee did in fact make such study for all coal mining districts in the United States.

Affiant further states that he was a co-author with the said R. V. Norris and the said Cyrus Garnsey, Jr., of a paper entitled "Method of Fixing Prices adopted by

the United States Fuel Administration" and the Report of the Engineers Committee, United States Fuel Administration, both of which have been published by the Government Printing Office, Washington, D. C.

Affiant has given special attention to the effect of the rate of production on costs in bituminous coal mining and has found that the interruption of working time always involves an increase of the unit costs, and that the rate of increase in unit cost tends to become materially greater than the rate of decrease in working time.

Affiant further says that by direction of the United States Fuel Administration, the Engineers' Committee of the United States Fuel Administration made a specific study of the effect of decrease in working time on cost of production, and that affiant took part in this investigation; that the material for such investigation consisted of (57) monthly reports of the cost of production and working time for the year 1917, made by 73 bituminous coal operators in the New River District in West Virginia to the Federal Trade Commission.

Affiant further states that the effect of decreased working time on per ton cost of production as shown by this investigation was plotted by said Engineers' Committee, and the chart thus plotted is Chart No. 61, appearing on page 92 of the Report of the Engineers' Committee, above referred to; that said Engineers' Committee also had access to a record of the production costs and working time of a bituminous coal operation at Barnesboro, Pennsylvania known as the Rich Hill Colliery, for the years 1913 to 1917, inclusive, and that said Committee also plotted the effect of decreased working time on production costs as shown by such record, and that the result so arrived at substantially agreed with the result arrived at in the case of the New River operations. The chart showing the result of the said investigation of the Rich Hill Colliery appears in said report of the Engineers Committee at page 95, as Chart No. 64.

Affiant further states that in making said charts the unit production cost for each operator was ascertained for months in which his operation worked full time, and the percentages of increase in cost in months in which such operation did not work full time were also ascertained, and the percentages of increase and average thereof

were plotted on said charts, and that the percentages and averages so ascertained were correctly calculated from data on which they were based.

Affiant further says that the percentage upon which Chart No. 61 is based reduced to tabular form as follows:

When Output is Below Normal by the Percentage.	Cost is above Normal By this Percentage.
(58)	Bituminous
5%	3.1%
10%	6.2%
15%	9.4%
20%	12.5%
25%	15.7%
30%	19.8%
35%	24.5%
40%	29.2%
45%	34.7%
50%	41.0%
55%	44.7%
60%	55.0%
65%	64.5%
70%	75.0%
75%	86.5%
80%	99.0%
85%	114.0%
90%	136.0%

Affiant further states as a result of the investigations hereinabove set forth and in view of his experience both as a bituminous coal operator and a mining engineer and cost accountant, that he is of the opinion that the percentages above set forth indicate the effect of decreased working time on cost of production for the bituminous coal industry in general.

JAMES H. ALLPORT.

Subscribed and sworn to before me this 18th day of June, A. D., 1920.

JOHN R. ULUSSER,

Notary Public in and for Cambria County, Pennsylvania.

My commission expires March 25th, 1921.

STATE OF PENNSYLVANIA,
(59) County of Cambria, ss:

I, Chas. A. MacIntyre, Clerk of the Orphans' Court, the same being a Court of Record in and for the County and State aforesaid, do hereby certify that John R. Musser is a Notary Public, in and for said County and State, duly Commissioned and qualified to act as such; that under the laws of this Commonwealth he is authorized to administer oaths and take acknowledgments of Deeds and other writing; that his term of office commenced on the 25th day of March, A. D., 1917, and will expire on the 25th day of March, A. D., 1991, and that his signature above written is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Ebensburg, Pa., this 18th day of June, A. D., 1920.

CHAS. A. MACINTYRE,
(Seal) Clerk of the Orphans' Court.

AFFIDAVIT OF R. V. NORRIS.

IN THE CIRCUIT COURT OF MARION COUNTY,
(60) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendant.	In Equity No.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

R. V. Norris personally appeared before me, a Notary Public in and for the County of Luzerne, State of Pennsylvania, and being duly sworn, deposed as follows:

First: That he is a Mining Engineer residing and doing business in Wilkes-Barre, Pennsylvanna, that he is a graduate of the School of Mines, Columbia College with the degree of Engineer of Mines, 1885, honorary degree

Master of Science from Columbia University, New York, 1914, and that he has held the following positions:

Assistant Engineer Susquehanna Coal Co., Mineral Railroad & Mining Company, Lykens Valley Coal Co., Summit Branch R. R. Co., Nanticoke Water Company, Lykens Water Company, etc., being the coal and water companies controlled by the Pennsylvania Railroad 1886 to 1900.

Chief Engineer same, 1900 to 1904.

Consulting Engineer same 1904 to 1914.

Consulting Engineer Delaware, Lackawanna & Western Railroad Company, Coal Mining Department, 1907 to 1918.

Consulting Engineer Wilkes-Barre & Hazelton Railroad, 1905, to date.

Consulting Engineer Sterling Salt Company, 1906 to date.

Consulting Engineer Coxe Bros. & Co., 1904 to 1905.

Consulting Engineer and General Manager Stone Canon Consolidated Coal Company, 1907 to 1909.

Engineer to the United States Fuel Administration, January 15th, 1918, to April 15th, 1919.

(61) Affiant further says that his experience has comprised the examination, appraisal, opening and direction of operation of mines, for the last thirty-four years, and as consulting engineer for the last sixteen years. In this is included the examination and appraisal of the anthracite properties of the Pennsylvania Railroad and of the Temple Iron Company, and of bituminous properties in Pennsylvania, West Virginia and California.

Affiant's experience in the Fuel Administration was as a member of the Engineers' Committee, which was in charge of all cost data, and the work of which included the study of the costs of production of all coal operations in the United States, except such as were so small as not to be required to report, said committee being composed of Cyrus Garnsey, Jr., J. H. Allport, and affiant.

Affiant further states that he has been a member of the American Institute of Mining and Metallurgical Engineers since 1885, and was a member of the Council thereof from 1908 to 1910, Vice-President from 1911 to 1912, and is now one of the Directors; that he is a member of the Institution of Mining Engineers of Great Brit-

ian, and was the delegate of that society to the International Engineering Congress at San Francisco in 1915, and Editor of the Coal Section of said Congress. Affiant is also a member of the American Society of Civil Engineers, and the American Society of Mechanical Engineers.

Affiant further states that in 1919, he was employed with Col. R. H. Montgomery, to devise a standard accounting system for the anthracite industry, and that the system so devised is now in general use.

Affiant is also the author of "Anthracite Mining Costs", a paper read before the American Institute of Mining Engineers, and published by that society in 1919, and is one of the co-authors of a paper entitled "Method of Fixing Prices of Bituminous Coal Adopted by the United States Fuel Administration", by Cyrus Garnsey, Jr., R. V. Norris, and J. H. Allport, and the Report of the Engineers' Committee, United States Fuel Administration, both of which have been published by the Government Printing Office, Washington, D. C.

Second: Affiant has made special studies of the effect of rate of production on costs, both in anthracite and bituminous mining, and has found invariably that the reduction of working time from any cause involves material increased unit costs, that the rate of cost increase is progressively greater than the rate of decrease in working time, that is, it is invariably found that as the working time decreases the cost increases in a rapidly increasing ratio.

(62) Affiant further says that by direction of the United States Fuel Administrator, the Engineer's Committee of the United States Fuel Administration made a specific study of the effect of decrease in working time on cost of production, and that affiant took part in this investigation; that the material for this investigation consisted of monthly reports of the cost of production and working time for the year 1917, made by 73 bituminous coal operators in the New River District in West Virginia to the Federal Trade Commission.

Affiant further states that the effect of decreased working time on per ton cost of production as shown by this investigation was plotted by said Engineers' Com-

mittee, and the chart thus plotted is Chart No. 61, appearing on page 92 of the Report of the Engineers' Committee, above referred to; that said Engineers Committee also had access to a record of the production costs and working time of a bituminous coal operation at Barnesboro, Pennsylvania, known as the Rich Hill Colliery, for the years 1913 to 1917, inclusive, and that said Committee also plotted the effect of decreased working time on production costs as shown by such record, and that the result so arrived at substantially agreed with the result arrived at in the case of the New River operations, the chart showing the result of the said investigation of the Rich Hill Colliery appears in said report of the Engineers Committee on page 95, as Chart No. 64.

Affiant further states that in making said charts the unit production cost for each operator was ascertained for months in which his operation worked full time, and the percentage of increase in cost in months in which such operation did not work full time were also ascertained, and the percentages of increase and averages thereof were plotted on said charts, and that the percentages and averages so ascertained were correctly calculated from the data on which they were based.

(63) Affiant further says that a similar analysis were made by him in the case of about nineteen anthracite collieries controlled by the Pennsylvania Railroad Company, in connection with a report and appraisal of the properties of the Susquehanna Coal Company made in 1915, which analysis showed results similar to those in the cases of the bituminous operations above referred to.

Affiant further says that the percentages upon which Chart No. 61 is based reduced to tabular form are as follows:

When Output is Below Normal by the Percentage.	Cost is above Normal By this Percentage.
	Bituminous.
5%	3.1%
10%	6.2%
15%	9.4%
20%	12.5%

25%	15.7%
30%	19.8%
35%	24.5%
40%	29.2%
45%	34.7%
50%	41.0%
55%	44.7%
60%	55.0%
65%	64.5%
70%	75.0%
75%	86.5%
80%	99.0%
85%	114.0%
90%	136.0%

And affiant states as a result of the investigations heretofore set forth that it is his professional opinion that the percentage above set forth are typical for the bituminous coal industry and fairly indicate the character and extent of additional costs resulting from decreases in operating time as compared with full time operation.

R. V. NORRIS.

Subscribed and sworn to before me this 17th day of June, A. D., 1920. My Commission expires March 25, 1921.

EDMUND E. JONES,
Notary Public in and for Luzerne County, Pennsylvania.

STATE OF PENNSYLVANIA,
(64) County of Luzerne, ss:

I, George Wagner, Clerk of the Court of Quarter Sessions of Luzerne County, in the State of Pennsylvania, the same being a Court of Record, having a Seal, do hereby certify that Edmund E. Jones, by whom the foregoing affidavit was taken and whose name is subscribed thereto, was at the time of taking the same, a Notary Public, residing in said County, duly commissioned and sworn, and authorized by the laws of said State to take the proof or acknowledgment of deeds or conveyance for lands, tenements or hereditament in such State, and

other instruments in writing and to administer oaths or affirmations in said County, and that I am well acquainted with his handwriting, and verily believe that the signature to the foregoing certificate is his genuine signature.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, which is the seal of the said Court this 18th day of June, 1920.

GEORGE WAGNER,
(Seal) Clerk of Courts.

AFFIDAVIT OF H. A. GARFIELD.

IN THE CIRCUIT COURT OF MARION COUNTY,
(65) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore & Ohio Railroad Co., Defendant.
} In Equity No.

COMMONWEALTH OF MASSSUCHETTS,
Berkshire County, ss:

H. A. Garfield, being first duly sworn, deposes and says that he was appointed United States Fuel Administrator by the President of the United States on the 23d day of August, 1917; that said appointment was made pursuant to an act of Congress commonly known as the Food and Fuel Control Act, approved August 10, 1917, and by its terms affiant was authorized and directed to execute the provisions of said Act relating to fuel, including the provisions of Section 25 thereof for the control and regulation of the production, distribution and price of coal and coke, and that affiant entered upon the duties of his office on or about the first of September, 1917.

Affiant further states that in the course of his investigation of the cause limiting the production and distribution of coal and the needs of the consuming public, especially of domestic consumers and those engaged in the manufacture of munitions of war, it became neces-

sary to inquire into the costs of production and the scope and effect of contracts theretofore entered into between producers and consumers of coal. Affiant found that about one-third of the bituminous coal produced in the United States was consumed by the railroads for locomotive fuel and that the conditions surrounding the supply of railroad fuel constituted the largest single factor entering into the question of labor supply in the production of coal and the price of coal to the public. Affiant having caused a special investigation to be made of conditions surrounding the supply of railroad fuel, it appeared that in certain districts of the country producing bituminous coal it had for a long time been the custom of (66) the railroads to enter into contracts with operators for railroad fuel based upon the supply to the operators making such contract of cars for the shipment of coal in excess of the number or proportion of cars which such operators would be entitled to receive upon the basis of the ratings of their mines. Affiant learned that operators, while realizing that the prices names by the railroads were excessively low, were nevertheless influenced to enter into these contracts in order to secure for themselves an ample car supply; that this question of car supply became in the eyes of operators of first importance whenever the demand for coal exceeded the available car supply.

Affiant further found that when, as in the spring of 1918, this condition of shortage in car supply prevailed, two conditions were present seriously harmful to the public.

First, operators having contracts for railroad fuel were able to ship coal substantially every day in the week; while other operators in the same field having no contracts for railroad fuel were compelled to close down their mines for lack of cars. This unbalanced condition threw large numbers of mine workers out of employment in the mines that were not furnishing railroad fuel, while in neighboring operations the labor found satisfactory employment. Affiant found this condition a subject of great and serious complaint among the mine workers, and that, at that particular time, namely, the spring and summer of 1918, it was of first importance to continue operations without suspensions and further that

conditions in the mining fields should be made so satisfactory to labor that the maximum of production could be secured.

Affiant found in the second place that the unbalanced situation produced by contracts involving a full assignment of cars inevitably resulted in imposing upon the public a burden, which it would not have otherwise had to bear and which was of considerable magnitude. This was in part due to the fact that as soon as a given mine was compelled by car shortage to fall below a certain production, the per ton cost of operation mounted rapidly, thereby throwing an unwarrantably large burden upon the purchasers of coal, assuming a constant amount representing profit; and partly because of the fact that the prices forced upon the operators by the railroads for railroad fuel were at figures so near to cost that what-
(67) ever profits were made by the operators were of necessity made from the purchasers of coal other than the railroads.

As a result of this investigation affiant became convinced that the public interest required the abandonment of the practice of preferential car supply to operators supplying railroad fuel, and on or about March 27, 1918, took steps to secure the adoption by the Director General of Railroads of the principle of an equal distribution of cars.

The position thus taken by affiant led to an issue with the Railroad Administration beginning about the 27th of March, 1918, and lasting until the latter part of May of that year. During this period there were frequent conferences between the Fuel Administration and the Railroad Administration, at which representatives of the Interstate Commerce Commission were occasionally present. Affiant's arguments in favor of a substantially equal car supply were met by the claim that the practice of preferential assignment of cars was of long standing and well recognized in the railroad world, that it was based on the necessity of maintaining the supply of railroad fuel so that the railroads might continue to perform their functions as common carriers, and that even if the Fuel Administration would undertake to insure a sufficient supply of locomotive fuel, the principle of equal car distribution would throw upon the railroads an

additional expense for the purchase of fuel amounting in the aggregate to from $40,000,000 to $60,000,000.

Affiant further states that ultimately a settlement was reached and approved by the Director General of Railroads, by the terms of which the preferential assignment of cars to operators supplying railroad fuel was to be discontinued and the government maximum prices of bituminous coal were to be reduced 10 cents per ton. This reduction was made by affiant in view of the reduction in the cost of producing coal which would be effected by the application of the principle of equal car supply.

Affiant further says that the settlement so reached was carried into effect and that affiant, as United States Fuel Administrator, signed an order on or about May 24, 1918, reducing all maximum prices of bituminous coal ten cents per ton, and that from the date of said order (68) and until the resignation of affiant as United States Fuel Administrator on December 13, 1919, the principle of equal car distribution was maintained and applied by the Railorad Administration, and the said reduction in price was maintained by the United States Fuel Administration.

H. A. GARFIELD.

Subscribed and sworn to before me this 16th day of June, A. D., 1920.

WM. J. CARTWRIGHT,
Notary Public, Berkshire County, Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,
(69) County of Berkshire, ss:

I, Irving H. Gamwell, Clerk of the Supreme Judicial Court, which is a Court of Record for the County and Commonwealth aforesaid, and has by law a seal, do hereby certify that Wm. J. Cartwright, whose signature is subscribed to the certificate on the annexed instrument and thereon written, was, at the date thereof a Notary Public, within and for said Commonwealth of Massachusetts, duly commissioned and sworn and residing in said County of Berkshire, and duly authorized to take the same, and an officer duly authorized by the laws of said Commonwealth to administer oaths or affirmations

and to take the acknowledgment or proof of deeds for the conveyance of lands, tenements or hereditaments in said Commonwealth of Massachusetts, or other instruments to be used or recorded therein, and that I am well acquainted with the handwriting of said Wm. J. Cartwright, and verily believe that the signature to the said certificate is genuine.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsfield, this 16th day of June, 1920.

(Seal) IRVING H. GAMWELL, Clerk.

MOTION OF DEFENDANT TO DISMISS WITH ANSWER.

In the District Court of the United States for the
(70) Northern District of West Virginia.
In Equity.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore and Ohio Railroad Company, Defendant.

Motion to Dismiss and Answer.

To the Honorable the Judge of the District Court of the United States for the Northern District of West Virginia:

The defendant respectfully moves the Court to dismiss said bill of complaint and for cause of motion shows:

1. That the bill does not state a case within the jurisdiction of the Circuit Court of Marion County or of this Court.

2. That it does not appear in said bill that the matters complained of have been complained of to the Interstate Commerce Commission or that said Commission has taken any action in respect thereof, and that the Circuit Court of Marion County has no jurisdiction in respect of the matters complained of in the bill and this

Court has no jurisdiction until the matters have been complained of to the Interstate Commerce Commission.

3. That the plaintiff has concealed the fact that the rules complained of are rules of the Interstate Commerce Commission, which fact was within the plaintiff's knowledge, and which fact is a most material and necessary fact for the proper determination of this case.

4. That this Bill is a bill to restrain the enforcement, operation and execution of an order of the Interstate Commerce Commission, and United States of America and the Interstate Commerce Commission are necessary parties to this case.

5. That said bill is without equity.

Wherefore, the defendant prays that said bill may be dismissed.

(71) The defendant not waiving its said motion to dismiss, but expersly relying on the same, answering, says:

1. It admits that the plaintiff is a corporation organozed and existing under the laws of the State of West Virginia, with its principal office in the city of Fairmont, Marion County, in said State.

2. It admits that the defendant is a corporation organized and existing under the laws of the State of Maryland and is a common carrier by railroad engaged in interstate transportation and, as such, subject to the Interstate Commerce Act, and further shows that the plaintiff was at the time of the commencement of this suit and, at all times since, has been and still is a resident and citizen of the State of West Virginia, and that the defendant was at the time of the commencement of this suit, and, at all times since, has been and still is a resident and citizen of the State of Maryland, having its principal office in Baltimore City, in said State, and that the plaintiff was not at the time of the commencement of this suit, nor at any time thereafter, nor is it a resident or citizen of any other State than said State of West Virginia, and

that the defendant was not at the time of the commencement of this suit, nor at at any time theerafter, nor is it a resident or citizen of any other State than said State of Maryland.

3. The defendant admits that this is a suit of a civil nature in equity, and shows that the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00). It admits that this suit necessarily involves and presents for decision the construction of the Interstate Commerce Act as amended, and involves and presents for decision paragraphs 10, 11, 12, 13, 14, 15, 16 and 17 thereof, which paragraphs were added to said Section 1 by Section 402 of the Transportation Act, 1920.

The defendant denies that the plaintiff has been or is deprived of the proper distributive share of cars available for the transportation of coal to which it is entitled under said act.

(72) 4. The defendant is not advised as to the business of the plaintiff in the operation of its mines, as alleged in paragraph 4 of the bill.

5. The defendant admits that it has maintained ratings of the capacity of the mines served by it, including the mines of the plaintiff, and now maintains such mine ratings in accordance with said act, as amended, and the rules of the Interstate Commerce Commission governing such rating.

The defendant admits that Exhibit A is a correct copy of the rules issued by its Transportation Department, April 16th, 1920, under the authority of said Commission as hereinafter stated.

The defendant further admits that the rating of the plaintiff's mine for the period from May 10th to June 9th, inclusive, 1920, was 11.5 fifty ton cars per day.

6. The defendant admits that, for some time past, the supply of cars available for transportation of coal has not been sufficient to afford to all mines upon its railroads sufficient cars to transport all of the coal which might be produced at said mines, but the defendant de-

nies that it has furnished and now furnishes cars for transportation of coal to certain mines served by it in excess of the share to which said mines are entitled, or that it has failed to furnish said mine of the plaintiff the share of cars to which said mine is entitled, or has made any unlawful distribution of the cars available for this service. On the contrary, the defendant avers that it has in all respects observed and complied with the law and the rules established by the Commission in respect to the distribution of cars.

7. The defendant avers that, prior to Federal control, it was its practice to assign cars for loading for fuel; that such practice had been the subject of numerous cases before the Commission and before the Federal courts; the history of these proceedings being fully set out in a report of the Commission responsive to Senate (73) Resolution No. 376, which report and a copy of the Senate Resolution, in response to which it was made, are herewith filed marked "Defendant's Exhibit A" and are prayed to be taken and read as a part of this answer. Said report also contains the reasons given by the Commission for the issuance of its order of April 15th, 1920, hereinafter referred to. That on or about June 24th, 1918, the United States Railroad Administration discontinued the practice of assigning cars for railroad fuel on the lines of the defendant's railroad, and the discontinuance of his practice continued until the order of the Commission of April 15th, 1920, became effective, April 16th, 1920. That upon the issuance of said order of April 15th, 1920, which directed the observance by all carriers subject to the act of Rule 8 as thereby modified until further direction of the Commission, the defendant in compliance with said direction of the Commission restored the practice of assigning cars for its railroad fuel and observed Rules 8, 9 and 10 in the distribution of such assigned cars, as it was required to do, and is now assigning cars for its railroad fuel and obeying the order of the Commission in counting cars assigned for its railroad fuel, as well as private and cars of other carriers assigned and delivered to it by such carriers for railroad fuel in accordance with the requirements of the Commission.

That the United States Railroad Administration had in effect at the termination of Federal control certain rules for the distribution of cars contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised). On March 2nd, 1920, the Commission issued a notice to carriers recommending that, until experience and study demonstrated that other rules would be more effective and beneficial, these rules be continued in force, which recommendation the defendant complied with and continued these rules in force. On April (74) 15th, 1920, the Commission issued its notice to Carriers and Shippers of that date stating that in view of the cessation of Government control of coal production and distribution, and in order that railroad fuel requirements might be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it had become necessary to amend said notice of March 2nd, 1920, and its recommendation therein, and, thereupon, the Commission recommended the revision of Rule 8 to read as quoted in the bill, and stated that, in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act, 1920, it suspended the operation of the existing Rule 8 and directed the observance by all carriers by railroad subject to the Interstate Commerce Act of Rule 8 modified as above, effective April 16th, 1920, and until the further direction or order of the Commission. Copies of said notice of March 2nd, 1920, and said notice of April 15th, 1920, are herewith filed marked "Defendant's Exhibit "B" and are prayed to be taken and read as a part hereof.

That the reasons stated by the Commission for its action in directing the restoration of the practice of assigning cars for railroad fuel are fully stated in its report to the Senate.

That in compliance with the order of the Commission of April 15th, 1920, the defendant caused to be issued by its General Superintendent of Transportation its rules governing the rating of coal mines and car distribution to such mines effective April 16th, 1920, a copy of which is filed as Plaintiff's Exhibit A.

8. That the defendant is informed and believes that

the plaintiff was fully advised of the issuance by the Commission of its notice of April 15th, 1920, which was sent to Carriers and Shippers and widely distributed and of which the Coal Trade was fully advised. That the plaintiff has not stated in its bill that such order was issued and that the rules issued by the defendant and filed (75) as Exhibit A with the bill were rules in strict conformity with the recommendation of the Commission of March 2nd, 1920, as directed to be amended by its notice of April 15th, 1920, which notice was an emergency order idduced by the Commission suspending the operation of existing Rule 8 and directing the observance by all carriers of Rule 8 as modified, which order is still binding upon the defendant and must be observed by it until revoked by the Commission or set aside by order of a court of competent jurisdiction in a proceeding filed for the purpose of setting aside such order. That the plaintiff has asked an injunction restraining the defendant from observing and enforcing Rules Nos. 8, 9 and 10, which it avers are the rules of the defendant, without advising the Court that said rules are rules first established by the United States Railroad Administration and recommended to be adopted by all carriers by said notice of the Commission of March 2, 1920, and as to Rule 8, which is the rule principally complained of, established by the orer of the Commission of April 15, 1920.

9. That said order of April 15, 1920, was not passed in a proceeding before the Commission in which either the plaintiff or the defendant were parties and does not relate to a matter complained of before the Commission. That the Commission's report to the Senate shows that said order was made by the Commission not in pursuance of any formal complaint made before the Commission, but as an administrative order of the Commission in the exercise of the power conferred upon it upon its own initiative without complaint by carriers or others.

10. The defendant admits that the supply of coal cars available for that service does not at the present time equal the requirements of the mines, and that such condition prevails on all of the roads largely engaged in carrying bituminous coal. That, prior to Federal control,

the defendant and other railroads observed the practice of assigning cars for railroad fuel as required by the (76) Commission under the orders issued in the cases referred to in its report to the Senate, and approved in the several cases therein referred to decided by the Supreme Court of the United States and the Circuit and District Courts. That in June, 1918, United States Fuel Administration had charge of the distribution of coal and had fixed a maximum price at which coal could be sold in the various district. The defendant, upon information and belief, denies that the practice of assigning cars for railroad fuel was discontinued because of representations made to the Director General of Railroads with respect to its disastrous effect upon the coal mining industry, as alleged in the bill, but, on the contrary, avers that it is informed and believes that the reason for the discontinuance of the practice of assigning cars for railroad fuel at that time was because the Fuel Administration believed that it could better perform the duties entrusted to it if it had entire control over the distribution of coal, and advised the railroads as appears from the letter of July 6, 1918, quoted in the bill, that the Fuel Administration would see that the carriers obtained an adequate current supply of fuel. That the discontinuance of the practice of assigning cars was brought about not on account of a finding that the practice under ordinary conditions was injurious to the coal mining industry, but because of the conditions then obtaining.

The defendant refers to the report of the Commission to the Senate, filed herewith, giving the opinion of the Commission as to the desirability of returning to the use of assigned cars at this time. As appears from this report, the Commission, since 1907, has had this question constantly before it in a number of cases which it cites, and it has reached the conclusion that the rules which it has put in force are the best rules after fully considering the question in all its aspects. It states "both before and since that action was taken, parties in- (77) terested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adopted to their uses which can fairly be substi-

tuted for the rule to which some objections have been made. No one has suggested such a substitute rule".

The defendant shows that the assignment of cars does not diminish the car supply available to the plaintiff for commercial purposes. The plaintiff requires for its fuel coal supply about 150 carloads of coal a day from the Fairmont district. Under the present rules these assigned cars are not deducted from the cars available for commercial distribution in this district, but are taken from the systems' supply of cars.

Other railroad companies are at this time sending into this district about 140 cars per day for railroad fuel commonly known as "foreign fuel cars". These cars are not taken from the cars of such railroads on the defendant's line in the usual course of interchange business, but are specially assembled and sent into the district for fuel, and constitute an addition to the cars coming into the district for coal.

The defendant further shows that the enjoining of it from observing Rules Nos. 8, 9 and 10 would not only affect the business of the plaintiff in this district and within the jurisdiction of this Court, but would affect its distribution of cars over its entire system, as the defendant could not adopt one practice in this district and a different practice in other respects without great confusion. That it would also very seriously interfere with the contracts and arrangements for fuel which have been made by other railroads taking their supply in this district and sending in into the district their own cars to transport the same.

(78) 11. The defendant denies that it has failed or refused to maintain and apply proper rating to the mine of the plaintiff or to give to the mine of the plaintiff its proper proportion of the cars available for transportation of coal, and avers that in issuing its rules governing the rating of coal mines and car distribution, filed as Exhibit A with the bill, and in its practice of car distribution and the assigning of cars for its railroad fuel, and in the counting of assigned cars, both private cars and cars placed for its own fuel and cars furnished by other carriers for their fuel, it has in all respects fully complied with the requirements of law and the lawful orders of the Commission made in pursuance thereof.

12. That the plaintiff does not allege in its bill that application has been made to the Interstate Commerce Commission to require the defendant to cease from its practice with respect to car service, or that any proceeding has been taken before the Commission by the plaintiff or others complaining that the rules, regulations and practices with respect to car service now observed by the defendant are not lawful or are unjust, unreasonable and discriminatory, and asking that the Commission order the defendant to put in force reasonable rules, regulations and practices with respect to car service, and in compliance with its legal duty. The defendant avers that no such proceedings before the Commission has been brought.

The defendant avers that the matters complained of are, under the Interstate Commerce Act and particularly under paragraphs (10), (11), (12), (13), (14), (15), (16), and (17) of Section 1 thereof, within the jurisdiction of the Interstate Commerce Commission, and the enforcement of the rights of the plaintiff under said Act is within such jurisdiction, and no action will lie to determine and enforce the rights of the plaintiff in respect of car service until application has been made to the Commission for a determination and enforcement of such rights.

(79) 13. The defendant, therefore, respectfully submits:

FIRST: That the plaintiff has not stated to the Court that the rules which it seeks to have enjoined were rules adopted by and ordered to be observed by the Commission, which fact is most material to a determination of this case and which fact was within the knowledge of the plaintiff, and that the bill should be dismissed because the plaintiff has concealed a most important fact necessary to a determination of the cause.

SECOND: That the matters complained of are within the jurisdiction of the Interstate Commerce Commission, and no action will lie in respect thereof until complaint has been made and the matter passed upon by the Commission.

THIRD: That the Commission, in the exercise of the authority conferred upon it by Section 1, Paragraph (15) of the Act has found that "and emergency exists requiring immediate action", and has directed the observance by all carriers by railroad subject to the Interstate Commerce Act of the method of car distribution sought to be enjoined by the bill, and that such action by the Commission is a lawful exercise of the authority conferred upon it by said Section.

The defendant, therefore prays that said bill may be dismissed with costs to the plaintiff.

And as in duty bound, etc.

THE BALTIMORE & OHIO RAILROAD COMPANY,

By H. R. HUNTER,
A. HUNTER BOYD, Jr.,
HOFHEIMER & TEMPLEMAN, Its Solicitors.

STATE OF MARYLAND,
(80) City of Baltimore, to-wit:

I hereby certify that on this 28th day of June, 1920, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared C. W. Galloway, who, being duly sworn, deposes and says: That he is Vice-President of the Baltimore and Ohio Railroad Company; that he has read said answer and knows the contents thereof, and that said answer and all the matters, things and allegations therein contained are true except those therein stated to be upon information and belief, and as to such allegations, matters and things he believes them to be true.

C. W. GALLOWAY.

Attest:

C. W. WOOLFORD, Secretary.

Taken, subscribed and sworn to before me this 28th day of June, 1920.

GEO. W. HAULENBERK,
(Seal) Notary Public.

My Commission expires May 21, 1922.

DEFENDANT'S EXHIBIT "A" WITH ANSWER.

66th Congress
(81) 2d Session S. Res. 376.

IN THE SENATE OF THE UNITED STATES

May 24 (Calendar day, May 29), 1920.

Mr. Harding submitted the following resolution; which was considered and agreed to.

RESOLUTION

Whereas the railroad companies are making assignments of freight cars; and

Whereas the said railroad companies, or a part of them, are making such assignment in a manner alleged to be discriminatory and prejudicial to the common public welfare; and

Whereas authority for making assignment of cars by said railroad companies is predicated upon an order of the Interstate Commerce Commission, which order is known as order numbered of the Interstate Commerce Commission, dated April 15, 1920, and entitled "Notice to carriers and shippers," and is in the following words and figures:

"The commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Cars Service

Section Circular CS31 (Revised) be continued in effect, except that rule eight as contained in said circular should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decision of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al., v. Hocking Valley Railway Co.* (12 I. C. C. 398) and *Traer v. Chicago & Alton Railroad Company, et al.* (13 I. C. C. 451, will be designated as 'Assigned' cars. All other cars will be designated as 'unassigned' cars."

1. Resolved, That the Interstate Commerce Commis-
2 sion be directed to inform the Senate upon what au-
3 thority, if any, said order was issued.

66th Congrss
(82) 2nd Session. S. Res. 376.

RESOLUTION

Directing the Interstate Commerce Commission to inform the Senate upon what authority its order of April 15, 1920, as to assigned and unassigned cars was made.

.....

.....By Mr. Harding.....

May 24 (calendar day, May 29), 1920,—Considered and agreed to.

INTERSTATE COMMERCE COMMISSION
(83) Washington

June 11, 1920.

To the President of the Senate:

I have the honor to transmit herewith report of the Interstate Commerce Commission *In re* Assignment of Freight Cars which is responsive to the direction conveyed by Senate Resolution No. 376 of May 24, 1920.

EDGAR E. CLARK, Chairman.

(84) June 11, 1920.

IN RE ASSIGNMENT OF FREIGHT CARS.

By Senate Resolution No. 376 the Interstate Commerce Commission was directed to inform the Senate upon what authority, if any, its order of April 15, 1920, entitled "Notice to carriers and shippers" was issued.

Prior to 1907 it was a common practice for the railroads to deliver to coal mines cars privately owned or leased, foreign railway fuel cars and cars for the carriers' own fuel loading, accordingly as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal, and to refrain from counting or charging such cars against the distributive shares of the mines to which they were given. In other words, all such cars were given to the mines for which they were intended and such mines were given in addition their full share of the other cars available for distribution. This practice was complained of as unreasonable and unduly prejudicial and in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, decided July 11, 1907, the Commission held that privately owned or leased cars, and foreign railway fuel cars sent on to the line by other railway companies for loading with fuel coal for the use of such other railway companies, should be given to the mines to which they were consigned or assigned but must be counted against the distributive shares of the mines, and that if such specially consigned or assigned cars equalled or exceeded the distributive share of a mine receiving them it should have no additional cars, and if the specially consigned or assigned cars did not equal the distributive share of the mine to which given it should be given additional cars only sufficient to make up its distributive share.

In the report in this case it was pointed out that in *U. S. ex rel Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 165 Fed. 113, a similar decision was made as to private cars and a contrary decision as to foreign railway fuel cars, but that in *Logan Coal Co.* v. *Penn. R. R. Co.*, 154 Fed. 497, it was held that such foreign railway fuel cars should be counted against the mines to which they were consigned.

Among other considerations mentioned in the Commission's report was the fact that a railroad company

would not send its cars on to the lines of another railway company even for its own fuel supply if they were to be diverted from that intended use and distributed among others than those to whom they were consigned for loading to various destinations on the lines of other carriers, thus rendering the fuel supply of the carrier sending the cars uncertain and depriving it of the use of its equipment.

In *Traer* v. *Chicago & Alton R. R. Co., et al.*, 13 I. C. C. 451, decided April 13, 1908, the same questions were presented that had been presented in *R. R. Com. of Ohio, et al., v. H. V. Ry. Co., supra*, and the additional question of the reasonableness of the carrier's failing to count against the mine to which they were delivered cars for loading with its own railroad fuel. The Commission followed the decision in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*, and in addition, held that the cars used by carriers on their own lines for transportation of their own fuel supply may be given to the mine or mines from (85) which such fuel supply is received, but that if such mine or mines also ship commercial coal fuel cars so supplied must be counted against the mine or mines under the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*.

In this case it was said that if a contract for fuel covers such supply as the carrier reasonably needs for its current operation and a period of car shortage should come it could use its equipment to procure its fuel even though it thereby deprived shippers of desired use thereof; that this right to so use its cars did not rest upon the ground of private contract but upon the public necessity that the railroad must have fuel; but that neither contract nor consideration of public policy which recognized the public necessity for fuel would justify the carrier during a period of car shortage in using its equipment for a superfluous supply of its own fuel when such equipment was demanded and needed by the shippers and the public. Recognizing the right of the carrier to secure its fuel supply either from mines which it owns or those the entire output of which it purchases, it was held that where the carrier purchases a portion of the output

of a mine which is also producing commercial coal it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnishes to that mine for its own fuel.

In *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. 86, decided June 2, 1908, the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra,* was again followed, and it was said that the ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; that the ownership of a private car or the possession of a foreign railway fuel car gives to a coal operator no preferred right to have it occupy a carrier's sidings or tracks as against a system car loaded by another operator, or to have it handled in trains in preference to a system car, and that when any of these general facilities are insufficient to move all the traffic offered no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines.

In *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 453, decided January 10, 1910, the Supreme Court of the United States sustained the decision of the Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra,* and in *Traer* v. *Chicago & Alton R. R. Co., supra,* and held that the act to regulate commerce delegated to the Commission authority to determine on complaint the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage as a means of prohibiting undue preferences and unjust discriminations.

In *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, 19 I. C. C. 356, decided March 7, 1910, the above decision of the Supreme Court was referred to in pointing out that the orders of the Commission with respect to the distribution of coal cars by interstate carriers remained unaffected by attacks that had been made upon them in the courts, and that further consideration of these questions in connection with this group of cases had confirmed the conviction that the general principles underlying the dis-

position made of previous cases were both sound and just. The rule applied by the carrier in the *Hillsdale case* was described, its effect was explained, and it was condemned as giving undue advantage in distribution to certain mines and as contrary to the previous decisions of the (86) Commission. In a supplemental report in this case, 23 I. C. C. 186, reparation was awarded for damages resulting from the discrimination which had been practiced and found.

In *Penna. R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, decided June 21, 1915, the Commission's award of reparation in *Hillsdale Coal & Coke Co.* v. *P. R. R. Co., supra*, was sustained by the Supreme Court notwithstanding the fact that an action had been brought in a State court on the same subject before the Commission had made its award of reparation. The Supreme Court held that where a complaint involves practices of carriers in distributing cars for interstate shipments no action is maintainable in any court for damages alleged to have been inflicted thereby until the Commission has made a finding as to the reasonableness of such practices.

In the Commission's report of June 9, 1914, to the Senate and House of Representatives in *Coal and Oil Investigation*, 31 I. C. C. 193, it said at page 218:

As to actual distribution of cars in accordance with the relative ratings of the mines, the opinion of the Commission is clearly set forth in *Tracy* v. *C. & A. R. R. Co.*, 13 I. C. C. 451, and it was sustained by the Supreme Court of the United States in 215 U. S. 452 and 479. Formerly, few of the roads counted against the mine ratings company fuel cars (i. e., cars to be loaded with the carrier's own fuel); private cars (i. e., cars owned or leased by coal companies); or foreign consigned cars (i. e., cars delivered by foreign roads for loading at particular mines). In the case just cited, the Commission ruled that all three classes of cars should be counted against the ratings as well as those furnished for commercial loading. In cases where the carrier takes the entire output of a mine, however, it has been considered permissible to deduct the number of cars delivered to that mine from

the available supply before prorating among mines shipping commercial coal, or both commercial and railroad coal.

The rule of law on this subject thus established remained the controlling rule for carriers generally, and apparently without friction or controversy, until during the war and under the rules of the Fuel Administration, including its zoning system, and while the roads were under federal control, the rule was changed and the use of assigned cars for loading with railroad fuel was abandoned. This change was followed by the imperative necessity of railroads resorting to confiscation of coal in transit in order to keep their roads in operation. In many instances the coal was confiscated at the mouth of the mine. Those familiar with these subjects are apparently unanimous in saying that the practice of confiscation is attended by more evils than is the practice of assigned cars for railway fuel.

When federal control terminated there was in effect on all roads under federal control a set of rules that had been formulated by the Railroad Administration after consultation with a committee of the National Coal Association, and in order that there might not be confusion because of different lines of action being followed by different individual roads the Commission on March 2, 1920, issued a notice to carriers and shippers recommending that until experience and study demonstrated that (87) other rules would be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

With the suspension of the activities of the Fuel Administrator and regulations which he had prescribed some railroads that did not have more than two or three days' supply of coal and that were and for some time had been securing their necessary fuel supply by confiscation at the mouth of the mines were sued for damages on account of such confiscation, injunctions were sought in State courts against the practice of confiscation, and when it was learned that the carriers were contemplating return to the yse of assigned cars injunctions were sought in State courts against the same carriers restraining them from using assigned cars. Numerous informal

conferences were had between the Commission and representatives of the coal operators and representatives of the railroads in an effort to find some way by which the carrier could be assured of a fuel supply without the use of assigned cars or resort to confiscation. A conference was arranged between a committee representing the railroads and a committee representing the National Coal Association for the purpose of devising, if possible, some plan that would effect that purpose but no concrete or definite suggestion to that end resulted. Transportation conditions in the country were serious. Railroads that were unable to meet the demands upon them for transportation would be wholly unable to function if they could not secure coal and many of them had not more than two or three days' supply.

Rule 8 of the Railroad Administration's rules which the Commission had recommended be adhered to until experience and study demonstrated that some other rules would be more effective and beneficial was as follows:

8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

It will be noted that under this rule private cars, some of which are owned and used by coal operators, and cars assigned to the mines by the Car Service Section of the Railroad Administration for railroad fuel or for other purposes were designated and treated as "assigned" cars. All other cars were designated and treated as "unassigned" cars.

Rules 9 and 10 of the Railroad Administration's rules were as follows:

9. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements,

will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

(88) It will be noted that under these rules the "assigned" cars were treated in the same manner as railway fuel cars were treated under the Commission's decisions in the cases hereinbefore cited.

Under the conditions that have been briefly outlined the Commission on April 15, 1920, changed its recommendation of March 2, 1920, and recommended that until further experience and study demonstrated that other rules will be more effective and beneficial the Railroad Administration's rules be continued in effect except that rule 8 should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al., v. H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer v. Chicago & Alton Railroad Co., et als.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission also expressed the opinion that an emergency existed requiring immediate action and in the exercise of the authority conferred by paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, it suspended the operation of the then existing rule 8 and directed the observance of rule 8 modified as above, effective April 6, 1920, and until further direction or order of the Commission.

Paragraph (12) of section 1 of the Interstate Commerce act, as amended by section 401 of the Transportation Act, 1920, declares it to be the duty of every carrier by railroad to make just and reasonable distribution of

cars for the transportation of coal among the coal mines served by it whether located on its line or lines or customarily dependent upon it for car supply, and to maintain and apply just and reasonable ratings of such mines during any period when the supply of cars available for such service does not equal the requirements of the mines, and to count each and every car furnished to or used by any such mine for transportation of coal against the mine, and provides a specific penalty for failure or refusal to comply with these requirements.

Paragraph (5) of section 1 of the Interstate Commerce act, as amended by section 400 of the Transportation Act, 1920, provides that charges made for any service rendered or to be rendered by carriers subject to the act shall be just and reasonable. The act does not attempt to define in detail what is a just and reasonable rate, fare or charge, or what is a just and reasonable distribution of cars or rating of mines. The Commission is authorized to determine what is a just and reasonable charge for transportation or what are just and reasonable rules for distribution of cars or rating of mines.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, authorizes the Commission whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission, and to make such just and reasonable directions with respect to car service as in its opinion will best promote the service in the interest of the public and the commerce of the people. The Com-
(89) mission's direction of April 15, 1920, was issued under authority of that paragraph.

The Commission is of opinion that paragraph (12) of section 1 of the Interstate Commerce act does not change the rule of law laid down in the *Hocking Valley* and *Traer cases, supra*. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States.

No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than that laid down by the Commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under federal control and the production, distribution and marketing of coal was under a war time federal administration. The passing of the roads from federal control and the suspension of the operation of the Fuel Administration's rules, together with the transportation conditions and shortage of fuel on hand, created an emergency in which the Commission acted in accordance with its best judgment. Both before and since that action was taken parties interested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adapted to their uses which can fairly be substituted for the rule to which some objections have been made. No one has suggested such a substitute rule. The nearest approach to it has been an expressed belief that a form of preferential contract could be devised under which the contracting railroad would have first call upon the output of a mine but so far as we are advised no such form of contract has been framed. It seems not inappropriate to say that the coal operators are not able to entirely agree among themselves as to the advantages or disadvantages of the assigned car practice.

Paragraph (15) of section 1 of the Interstate Commerce act, as amended by section 402 of the Transportation Act, 1920, authorizes the Commission to direct priorities in transportation. If priorities were to be prescribed in transportation of bituminous coal it would obviously be necessary to give first priority to that for railway fuel, as was done when priorities were issued by the President's priority agent during the war.

Copies of United States Railroad Administration's Car Service Section Circular CS-31 (Revised) and of the Commission's direction of April 15, 1920, are appended hereto and made a part hereof.

DEFENDANT'S EXHIBIT "B" WITH ANSWER.

INTERSTATE COMMERCE COMMISSION
Washington.

(90) April 15, 1929.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All others cars will be designated as "unassigned" cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce act, as amended by Section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16,

1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. McGINTY, Secretary.

A true copy:

(Seal) GEORGE B. McGINTY, Secretary.

INTERSTATE COMMERCE COMMISSION
Washington.

(91) March 2, 1920.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal is insufficient to meet the demand. Unusual movements incident upon the strike of coal miners has brought about an abnormal location of cars. It is desirable that the proper relocation of cars shall be brought about as rapidly and with as little confusion as is possible. Critical situations still exist in which fuel for essential industries and purposes must be provided. The railroads and the coal operators have all been working under the uniform mine rating and car distribution rules established by the Railroad Administration and those rules seem to be generally satisfactory and to meet with general approval.

To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

GEORGE B. McGINTY, Secretary.

(92) Entered June 30th, 1920.

INJUNCTION ORDER.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. Baltimore & Ohio Railroad Company, Defendant.	Preliminary Injunction.

On the 29th day of June, 1920, came the plaintiff and moved the court for an order of injunction as prayed for in the Bill of Complaint, and tendered in support of its motion the affidavits of Samuel D. Brady, Brooks Fleming, Jr., Claude M. Stubbins, Cletus H. Jenkins, James M. Orr, James H. Allport, R. V. Norris and H. A. Garfield, due notice of said motion having been given the Defendant, and asked leave to file the said affidavits. The Defendant objected to the filing of said affidavits and each of them and moved the court to reject the same; and said objection and motion to reject are now here overruled and it is ordered that said affidavits be and the same are hereby filed. And thereupon the Defendant tendered and asked leave to file its answer to said bill and the exhibits with said answer and it is ordered that said answer and exhibits be and the same are hereby filed. And thereupon the Defendant objected to the hearing or determination of said motion for an injunction by this court or the judge thereof in the absence of two other judges, and moved the court that the judge of the court call to his assistance two other judges of whom one at least shall be a circuit judge, said three judges to hear and determine said motion for an injunction, in accordance with the Act of Congress of October 22, 1913, which objection and motion of the Defendant having been argued by counsel, it is ordered that said objection and motion of Defendant be and the same hereby are overruled. (93) And said motion of the Plaintiff for an injunction, and the motion of the Defendant contained in its answer to dismiss the Bill of Complaint being fully argued by counsel for the Plaintiff and counsel for the Defendant and submitted to the court upon said arguments, said

Bill of Complaint and exhibits, said affidavits filed on behalf of Plaintiff, and said answer with the exhibits thereto of the Defendant, said motion of the Defendant to dismiss the Bill of Complaint is overruled.

The court being of the opinion that Section 1, paragraph (12) of the Interstate Commerce Act expressly provides that "During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine" and that rules 8, 9 and 10 of the Defendant providing for car distribution, which rules are set forth in the Bill of Complaint filed herein, are in direct conflict with said provisions and are therefore void.

It is Adjudged, Ordered and Decreed that the Defendant, the Baltimore & Ohio Railroad Company, a corporation, and all its officers, agents, servants and employes be and they are hereby enjoined, within the jurisdication of this court, during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by the Defendant does not equal the requirements of such mines and until the further order of this court, from distributing to any mine served by it more cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting of each and every car furnished to or used by said mine for transportation of (94) coal against that mine; and that the Defendant, and all its officers, agents, servants and employes be and they are hereby likewise enjoined within the jurisdiction of this court, during any such period and until the further order of this court, from distributing to the said mine of the Plaintiff a lesser number of cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting against the mine of each and every car furnished to or used by it for transportation of coal; and that the Defendant, and all its officers, agents, servants and employes likewise be and they are hereby enjoined, within the jurisdiction of this court, during any such period, and until the further order of

this court from observing or enforcing Defendant's rules numbers 8, 9 and 10 set forth in said Bill of Complaint, or any or either of said rules, or any other rules, regulations or practices having the same or like effect; and that the Defendant, and all its officers, agents, servants and employees be and they are hereby ordered and directed, within the jurisdiction of this court, until the further order of this court, to comply with the provisions of paragraph 12 of Section 1 of the Interstate Commerce Act and, during any such period, to maintain and apply mine ratings to all of the mines served by the Defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it; and that the Defendant, and all its officers, agents, servants and employes be and they are hereby enjoined, within the jurisdiction of this court, during any such period, and until the further order of this court, from adopting or enforcing for any cause, reason or pretext whatsoever any rule, regulation or practice, which, or the result of which, will give to any mine served by the Defendant, cars for transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or less than or different from the (95) ratio of the total number of cars available on Defendant's line for transportation of coal to the total rated capacity of all mines served by Defendant.

And the Defendant expressing its desire to appeal from this order and secure a supersedeas thereto it is ordered that this order shall not in any event be in effect until the 20th day of July, 1920, and until the Plaintiff shall file with the clerk of this court, its bond with surety approved by said clerk, in the penalty of one thousand dollars ($1,000.00), conditioned upon said plaintiff paying to said Defendant all costs and damages resulting from this temporary injunction in case the same shall be dissolved as having been improperly awarded.

Enter: June 30th, 1920.

ALSTON G. DAYTON, Judge.

NOTICE OF MOTION FOR THE ALLOWANCE OF APPEAL.

(96) Filed July 9, 1920.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company.

To Messrs. Butler, Lamb, Foster & Pope, Attorneys for Lambert Run Coal Company:

You are hereby notified that The Baltimore and Ohio Railroad Company, the above-named defendant, will on Monday, July 12, 1920, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, appear before said Circuit Court of Appeals in its court-room at Asheville, North Carolina, and move the court for the allowance of an appeal herein, and will at the same time make motion to suspend the injunction granted herein, and for such other orders as may be necessary.

Dated this 9th day of July, A. D., 1920.

HERBERT R. PRESTON,
Solicitor for The Baltimore and Ohio Railroad Company.

Received a copy of the above notice this 9th day of July, A. D., 1920.

BUTLER, LAMB, FOSTER & POPE,
Solicitors for Lambert Run Coal Company.

(97) Filed July 13th, 1920.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

(ASSIGNMENT OF ERRORS).

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company. } In Equity.

Comes now the defendant, The Baltimore and Ohio Railroad Company, and says that in the interlocutory order or decree granting an injunction made and entered in the above entitled cause on the 30th day of June, 1920, there is manifest error in this:

1. The District Court of the United States for the Northern District of West Virginia erred in making and entering said order or decree of the 30th day of June, 1920.

2. Said District Court erred in granting the injunction granted by it on the 30th day of June, 1920.

3. Said District Court erred in hearing and determining the appilcation of the plaintiff for an injunction in the absence of three judges, of whom at least one should be a Circuit Judge.

4. The District Judge, presiding in said District Court, erred in hearing and determining the application of the plaintiff for an injunction in the absence of two other judges, at least one of whom should be a Circuit Judge, and in refusing to call to his assistance to hear and determine said application as such two other judges.

5. Said District Court erred in not holding that this cause is a case brought to enjoin, set aside, annul, or suspend in whole or in part, the order of the Interstate Commerce Commission, made by said Commission on the 15th day of April, 1920, which said order was, and is as follows:

"INTERSTATE COMMERCE COMMISSION
"Washington

(98) "April 15, 1920.

"Notice to Carriers and Shippers:

"The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view

of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

"The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Tracr* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce act, as amended by Section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission."

6. Said District Court erred in not holding that this cause is a case brought to enjoin, set aside, annul or suspend in whole or in part said order of the Interstate Commerce Commission made on the 15th day of April, 1920, (99) of which the Circuit Court of Marion County, West Virginia, had no jurisdiction, and in consequence of which want of jurisdiction of said Circuit Court of Marion County said District Court had and has no jurisdiction of said cause.

7. Said District Court erred in not holding that said order of the Interstate Commerce Commission made on the 15th day of April, 1920, was and is within the jurisdiction and authority of said Commission under and by virtue of the Act to Regulate Commerce as amended, and especially under and by virtue of paragraphs Nos. (10), (11), (12), (13), (14), (15), (16) and (17) of Section 1 of said act as amended by the Transportation Act, 1920.

8. Said District Court erred in not holding that said order of the Interstate Commerce Commission made on the 15th day of April, 1920, was and is a valid enforceable order under and by virtue of the Act to Regulate Commerce as amended and especially under and by virtue of paragraphs Nos. (10), (11), (12), (13), (14), (15), (16) and (17) of Section 1 of said act as amended by the Transportation Act, 1920.

9. Said District Court erred in holding that the rules Nos. 8, 9, and 10 are in conflict with paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920, and void, and in enjoining within the jurisdiction of said court the said defendant and all its officers, agents and employes from observing and enforcing said rules 8, 9, and 10, or any or either of said rules, or any other rules, regulations or practice having the same or like effect. Said rules were and are as follows:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned cars.'

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

(100) "10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

10. Said District Court erred in holding that in distributing cars for the transportation of coal under and in accordance with said Rules 8, 9 and 10, said defendant does not make a just and reasonable distribution of cars for the transportation of coal among the coal mines served by it.

11. Said District Court erred in holding that in distributing cars for the transportation of coal under and in accordance with said Rules 8, 9 and 10, said defendant does not maintain and apply just and reasonable ratings of the mines served.

12. Said District Court erred in holding that in distributing cars for the transportation of coal under and in accordance with said Rules 8, 9 and 10, said defendant does not count each and every car furnished to or used by the mines to which assigned cars are furnished against such mines.

13. Said District Court erred in holding that during any period when the supply of cars available for the transportation of coal does not equal the requirements of of the mines served by said defendant, said defendant does not, in and by the distribution of such cars under and in accordance with said Rules 8, 9 and 10, maintain and apply just and reasonable ratings of such mines.

14. Said District Court erred in holding that during any period when the supply of cars available for the transportation of coal does not equal the requirements of the mines served by said defendant, said defendant does not, in and by the distribution of such cars under and in accordance with said Rules 8, 9 and 10, count each and every assigned car furnished to or used by any such mine for the transportation of coal against the mine.

(101) 15. Said District Court erred in holding that the assignment of said defendant's railroad fuel cars, foreign railway fuel cars, and private coal cars under and in ac-

cordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

16. Said District Court erred in holding that the assignment of said defendant's railroad fuel cars under and in accordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

17. Said District Court erred in holding that the assignment of foreign railway fuel cars under and in accordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

18. Said District Court erred in holding that the assignment of private coal cars under and in accordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

19. Said District Court erred in holding that in assigning said defendant's railroad fuel cars, foreign railway fuel cars and private coal cars, said defendant does not maintain or apply just and reasonable ratings of the mines served by it.

20. Said District Court erred in holding that in assigning said defendant's own fuel cars, foreign railway fuel cars and private coal cars, said defendant does not count said cars so assigned against the mine or mines to (102) which the same are assigned.

21. Said District Court erred in holding that during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirements of such mines, the operation or effect of assigning said defendant's railroad fuel cars, foreign railway fuel cars and private coal cars, or any of said classes of cars, to other mines is to distribute to any mine to which such cars are assigned more cars than the said

mine is entitled to under the maintenance or application of its mine rating, or that the operation or effect thereof is not to count each and every car furnished to or used by said mine to which such cars are assigned for the transportation of coal against that mine, or that the operation or effect thereof is to distribute to the mine of the plaintiff a lesser number of cars than said mine is entitled to under the maintenance or application of its mine rating.

22. Said District Court erred in holding that the operation or effect of the assignment of said defendant's railroad fuel cars, foreign railway fuel cars and private coal cars, during any period when the supply of cars available for distribution for the transportation of coal by the mines served by said defendant does not equal the requirements of such mines, is to give to any mine to which said cars are assigned cars for the transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or different from the ratio of the total number of cars available upon said defendant's line for the transportation of coal to the total rated capacity of all mines served by said defendant.

23. Said District Court erred in holding that the operation or effect of the assignment of said defendant's railroad fuel cars, foreign railway fuel cars (103) and private coal cars, during any period when the supply of cars available for distribution for the transportation of coal by the mines served by said defendant does not equal the requirements of such mines, is to give a mine to which such cars are not assigned cars for the transportation of coal in an amount the ratio of which to the rated capacity of the said mine is less than or different from the ratio of the total number of cars available upon said defendant's line for the transportation of coal to the total rated capacity of all mines served by said defendant.

24. Said District Court erred in not holding that the said Court had and has no jurisdiction of the matters and things complained of by the plaintiff, nor to grant relief in respect thereto, it not appearing in or by the bill of

complaint that the matters and things complained of therein have been complained of to the Interstate Commerce Commission or that said Commissions has taken any action or made any order in respect thereto.

25. Said District Court erred in not holding that the determination of the question whether said Rules 8, 9 and 10, and the assignment and distribution of cars under and in accordance therewith were or are valid, reasonable, preferential or discriminatory, or the contrary, was and is in the first instance within the administrative functions of the Interstate Commerce Commission, and that if said rules or the assignment and distribution of cars under and in accordance therewith have not been ordered or authorized by said Commission, said District Court had and has no jurisdiction to determine said question or to grant relief in respect thereto until complaint shall have been made and action taken or an order made in respect thereto by said Commission.

26. Said District Court erred in not holding that the United States was and is an indispensable party to said suit.

(104) 27. Said District Court erred in not holding that the Interstate Commerce Commission was and is an indispensable or necessary party to said suit.

28. Said District Court erred in hearing or determining the plaintiff's application for an injunction in the absence of notice of the hearing to the Interstate Commerce Commission and to the Attorney-General of the United States.

29. Said District Court erred in holding that the emergency powers of the Interstate Commerce Commission under Paragraph (15) of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act, 1920, did not authorize the making of said order of the 15th day of April, 1920, of said Commission.

30. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any pe-

riod when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirements of such mines, and until the further order of said Court, from distributing to any mine served by it more cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting of each and every car furnished to or used by said mine for transportation of coal against that mine.

31. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirementts of such mines, and until the further order of said Court, from distributing to the mine of the plaintiff a lesser number of cars than the said mine is entitled to under the maintenance and application of (105) its mine rating and the counting against the mine of each and every car furnished to or used by it for transportation of coal.

32. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by defendant does not equal the requirements of such mines, and until the further order of said Court, from observing or enforcing said Rules Nos. 8, 9 or 10, or any of said rules, or any other rules, regulations and practices having the same or like effect.

33. Said District Court erred in ordering and directing within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes, until the further order of said Court, to comply with the provisions of paragraph (12) of Section 1 of the Interstate Commerce Act.

34. Said District Court erred in ordering and direct-

ing within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirements of such mines, to maintain and apply mine ratings to all of the mines served by said defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it.

35. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by the defendant does not equal the requirements of such mines, and until the further order of said Court, from (106) adopting or enforcing for any cause, reason or pretext whatsoever, any rule, regulation or practice which, or the result of which, will give to any mine served by the said defendant cars for transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or less than or different from the ratio of the total number of cars available on defendant's line for the transportation of coal to the total rated capacity of all mines served by the said defendant.

36. Said District Court erred in not holding that said Court as a court of equity has and had no jurisdiction of this suit.

37. Said District Court erred in not sustaining the motion of said defendant to dismiss the bill of complaint.

Wherefore, this defendant prays that said order or decree of said District Court so made and entered on the 30th day of June, 1920, may be reversed, and that such order or decree may be made and entered, or directed to be made and entered, as the premises may require.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

By H. R. PRESTON,
A. HUNTER BOYD, JR.,
HOFFHEIMER & TEMPLEMAN.

H. R. PRESTON,
A. HUNTER BOYD, JR.,
HOFFHEIMER & TEMPLEMAN,
Counsel for Defendant.

MEMORANDUM.

(107) Petition for Appeal, filed July 13, 1920.

Order Allowing Appeal, filed July 13, 1920.

Appeal Bond Penalty $1,000, filed July 13, 1920.
Obligor: Baltimore & Ohio R. R. Co.
Conditioned for Costs and Damages.

Citation Dated July 13, 1920.

Service of Citation Accepted July 13, 1920.
Filed July 13, 1920.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

(108) Northern District of West Virginia, ss:

I, A. T. Barrett, Clerk of the District Court of the United States for the Northern District of West Virginia, hereby certify that the foregoing transcript, is a true and correct copy of all papers filed and orders entered in the District Court of the United States for the Northern District of West Virginia, in the equity cause of the Lambert Run Coal Company vs. The Baltimore and Ohio Railroad Company, as taken from the record and papers on file in my office.

Given under my hand and the seal of said Court, this 15th day of July, 1920.

(Seal of Court) A. T. BARRETT,
Clerk U. S. District Court, Northern District of
West Virginia.

On the same day, to-wit, July 19, 1920, the original petition for an appeal, order allowing appeal, appeal bond and citation, are certified up under Sec. 7 of Rule 14.

Same day, the appearance of H. R. Preston, Geo. M. Hoffheimer and A. Hunter Boyd, Jr., is entered for the appellant.

Same day, the appearance of John A. Howard, Rush C. Butler and Frank E. Harkness is entered for the appellee.

MOTION OF APPELLANT FOR STAY OR SUSPENSION OF INJUNCTION OF DISTRICT COURT.

Filed July 19, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

COMES NOW the Appellant and respectfully moves the Court to grant a stay or suspension of the injunction or the operation or effect of the injunction, ordered by the Court below, during the pendency of this appeal.

H. R. PRESTON,
GEO. M. HOFFHEIMER,
A. HUNTER BOYD, JR.,
Counsel for Appellant.

ARGUMENT OF CAUSE.

July 19, 1920 (July Term, 1920), cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

ORDER STAYING AND SUSPENDING OPERATION AND EFFECT OF INJUNCTION GRANTED BY DISTRICT COURT.

Filed and Entered July 19, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi.

ON THE MOTION of the Appellant, by its counsel, IT IS ORDERED that the injunction granted by the Court below, and the operation and effect of said injunction, be and the same are hereby stayed and suspended until the decision and determination of this appeal.

July 19, 1920.

J. C. PRITCHARD,
Senior Circuit Judge Presiding.

OPINION.

Filed August 11, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi.

(Argued July 19, 1920. Decided August 11, 1920.)

Before PRITCHARD, KNAPP and WOODS, Circuit Judges.

HERBERT R. PRESTON and GEORGE M. HOFFHEIMER (A. HUNTER BOYD, JR., on brief) for the appellant, and JOHN A. HOWARD, RUSH C. BUTLER and FRANK E. HARKNESS for the appellee: BLACKBURN ESTERLINE, Special Assistant to Attorney General, and P. J. FARRELL, Chief Counsel Interstate Commerce Commission, as *Amici Curiae*.

WOODS, Circuit Judge:

The complainant, a coal mine served by the defendant railroad company, set out in its bill filed in the Circuit Court of Marion County, West Virginia, that it was suffering continuous loss and damage by reason of the refusal of the defendant in a period of shortage of coal cars to comply with the following provision of Section 402, Transportation Act of 1920:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense which may be recovered in a civil action brought by the United States."

Loss and injury was alleged as the result of not counting against mines in the distribution of cars according to the mine ratings all cars to be loaded with railroad fuel coal, thus giving to mines furnishing coal for railroad fuel a preference or priority in the number of cars supplied to the disadvantage of plaintiff's mine and other mines not furnishing railroad fuel coal, or furnishing a less quantity of railroad fuel coal. The resulting disadvantages and losses to the plaintiff are set out in detail in the bill and in affidavits attached thereto. The cars to be thus used for railroad fuel are described as assigned cars.

The plaintiff asked that the defendant be enjoined from continuing its alleged illegal method of distributing coal cars to the mines according to their ratings

without counting against the mine each and every car including railroad coal cars. The cause was removed to the United States District Court for the Northern District of West Virginia. On the merits, the defense set up in the answer is that the rule and practice of the defendant is authorized and required by the following rules of the Interstate Commerce Commission:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. R'y Co.*, 12 I. C. C. 398, and *Tracy* vs. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned cars.'

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

It appears from both bill and answer that the United States Railroad Administration abolished the assigned car rule by order of July 6, 1918. After the passage of the Transportation Act on February 28, 1920, the Interstate Commerce Commission continued the order of July 6, 1918, in force, until April 15, 1920, when it restored the assigned car practice by amending rule 8 and promulgating it in the amended form above quoted.

The amended rule 8 construed in connection with rule 9 is not a reinstatement of the assigned car rule that once existed, namely, that cars assigned for railroad fuel coal were not counted at all, and the mines to which

they were assigned received in addition the same number of unassigned cars according to their rating as if they had received no assigned cars. It does mean, however, that a mine may receive any number of cars assigned for railroad fuel, although in excess of the number of cars due according to its rating, taking all cars into account; and if the assigned cars so received equal or exceed its pro rata share under its rating it receives no unassigned cars. But the assigned cars so received are eliminated from the entire car supply. This reduction of the number of cars to be prorated, manifestly results in not counting each and every car against the mine which receives more cars for railroad fuel than it would be entitled to if all the cars were included in the number to be distributed.

In the order or notice to carriers and shippers promulgating the amended rule, the Commission states that in its opinion an emergency existed by reason of the continued shortage of coal cars, the cessation of government control, and the importance of meeting railroad fuel requirements without the necessity of carriers resorting to confiscation of commercial coal. As authority for this order the Commission relies on Section 1 of the Interstate Commerce Act as amended by Section 402 of Transportation Act of February 28, 1920. The relevant portions of the statute are:

"(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) *to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission;* (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emer-

gency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) *to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them.*"

Attached to the answer is an elaborate written response of the Commission to a Senate resolution directing the Commission to inform the Senate upon what authority, if any, its order or notice of April 15, 1920, was issued. Therein the Commission relied particularly for its authority on the provisions of subdivision 15 which we have italicized.

At the time of the application for the injunction a motion was made to dismiss the bill on the uncontroverted facts appearing in the bill and answer. The motion was denied. The defendant then took the position that since it appeared that the application was really for an injunction restraining the execution of an order of the Interstate Commerce Commission it could be heard and determined only by three judges, of whom one at least should be a circuit judge, after five days' notice to the Interstate Commerce Commission and to the Attorney General. This position was also overruled, and the District Judge made an order enjoining the defendant, in any period of coal car shortage, from distributing cars except in precise accordance with subdivision 12 counting each and every car furnished to a mine against that mine. By its terms this order was limited in its op-

eration to the jurisdiction of the District Court for the Northern District of West Virginia.

We cannot doubt that by subdivision 12 of Section 402 the Congress clearly expressed the intention to abolish all preference to mines furnishing railroad fuel coal under the assigned car rule in periods of ordinary car shortage.

The count of each and every car required is not a mere independent futile enumeration; but a count of each and every car furnished or used against the mine to the end that there should be proportional distribution of all available coal cars resulting in fair and equal opportunity to each mine on the basis of its rating. Before the enactment of the statute the matter had been controlled by rules, regulations and practices made by railroads or the government railroad administration which had been the subject of much controversy. Evidently the Congress having in view this controversy after full consideration settled the matter by an imperative enactment against the assigned car rule in times of ordinary coal car shortage. Thus it appears to us the rules of the Interstate Commerce Commission above set out are not in accord with subdivision 12 of the Transportation Act of 1920, standing alone.

The authority given to the Commission by (a) subdivision 15 in cases of emergency "to suspend the operation of any or all rules, regulations or practices then established with respect to car service" does not extend to the suspension of a positive and definite enactment of the statute covering the subject. Rules, regulations and practices mean the rules, regulations and practices adopted by the Commission or by the railroads in conformity to the act or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from subdivisions 11 and 14 of the same section and other portions of the statute. If therefore the order of the Commission had no other basis than the authority conferred to suspend rules, regulations and practices it would be without support. *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *United Verde Copper Company*, 196 U. S. 207; *Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Grimaud*, 220 U. S. 506.

The Congress has not, however, conferred on coal

mines equality among themselves—the right of each mine in time of coal car shortage to be furnished cars in proportion to mine ratings without regard to the public welfare and safety. Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation and unexpected needs of the public which cannot be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that "whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority * * * * (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them."

The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long existing car shortage. But recognizing the necessity of a degree of flexibility, the Congress conferred upon the Commission power in case of a car shortage which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings with preference and priority to such extent as will in its opinion meet the emergency.

All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the Commission when they find an emergency requiring it.

Our conclusion is that the making and promulgation

of rule 8 as amended was clearly within the power of the Commission.

The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised. *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 478; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress in conferring the right could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff claiming the benefits of the statute cannot assert the unconstitutionality of its limitations. *Daniels* v. *Tearney*, 102 U. S. 415; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17.

For these reasons the motion to dismiss the bill should have been granted.

Even if the District Court had been right in refusing the motion to dismiss the bill the order of injunction could not stand, because the execution of the order of the Interstate Commerce Commission could be enjoined only by three judges, one of them being a circuit judge, after notice to the Commission and to the Attorney General. Act October 22, 1913, Compiled Statutes, Section 998.

A decree will be entered dissolving the injunction and dismissing the bill.

Reversed.

DECREE.

Filed and Entered August 12, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of West Virginia, at Philippi, with directions to dissolve the injunction and dismiss the bill in accordance with the opinion of this Court.

August 12, 1920.

C. A. WOODS,
U. S. Circuit Judge.

PETITION FOR APPEAL.

Filed Sept. 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

IN EQUITY.

To the Honorable United States Circuit Judge:

Your petitioner, the above named Lambert Run Coal Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the twelfth day of August, 1920, does hereby appeal from said decree for the reasons set forth in the assignment of errors filed herewith. Your petitioner represents that the matter in controversy in said suit exceeds one thousand dollars exclusive of costs, and that this cause is one in which the United States Circuit Court of Appeals has not final jurisdiction and that it is a proper case to be reviewed by the Supreme Court of the United States on appeal. Your petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such Court in such cases made and provided. And your petitioner further prays that this Court may make the proper order relating to the security to be required of

petitioner on its bond for costs and damages on appeal.

Your petitioner also prays that this Court will make all other necessary orders in this matter as the law and rules direct, and your petitioner as in duty bound will ever pray, etc.

JOHN A. HOWARD,
BUTLER, LAMB[redacted], FOSTER & POPE,
Of Counsel for Lambert Run Coal Co.,
a Corporation, Petitioner.

ASSIGNMENT OF ERRORS.

Filed September 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Now comes Lambert Run Coal Company in the above entitled cause and files the following assignment of errors, upon which it will rely upon the prosecution of its appeal in the above entitled cause from the decree made and entered by this Honorable Court on the eleventh day of August, 1920.

I.

That the said Circuit Court of Appeals erred in rendering its said decree of the twelfth day of August, 1920,

in which decree the court ordered that the injunction granted by the District Court for the Northern District of West Virginia be dissolved and that the bill be dismissed.

II.

That said Circuit Court of Appeals erred in reversing the decree rendered by the District Court of the United States for the Northern District of West Virginia on June 30, 1920, awarding a temporary injunction as therein and thereby granted.

III.

That said Circuit Court of Appeals erred in holding that paragraph 15 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12 of Section 1 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920.

IV.

The said Circuit Court of Appeals erred in holding that clause "A," paragraph 15 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920.

V.

The said Circuit Court of Appeals erred in holding that clause "D," paragraph 15 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12, Section I of the Interstate

Commerce Act as amended by Section 402 of the Transportation Act of 1920.

VI.

The said Circuit Court of Appeals erred in reaching the following conclusion:

"We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that 'whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority * * * (d) to give direction for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them.'

"The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long existing car shortage. But recognizing the necessity of a decree of flexibility, the Congress conferred upon the Commission power in case of a car shortage, which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings with preference and priority to such extent as will in its opinion meet the emergency.

"All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the Commission when they find an emergency requiring it.

"Our conclusion is that the making and promulgation of rule 8 as amended was clearly within the power of the Commission.

"The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised."

VII.

The said Circuit Court of Appeals erred in reaching the following conclusion:

"The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress in conferring the right could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff claiming the benefits of the statute cannot assert the unconstitutionality of its limitations."

VIII.

The said Circuit Court of Appeals erred in reaching the conclusion that the Interstate Commerce Commission has the power to suspend the operation of paragraph 12, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920, when in the opinion of the said Commission an emergency exists. And that the order so made is not subject to review.

IX.

The said Circuit Court of Appeals erred in reaching the conclusion that clause "D" or any other clause in paragraph 15, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, under any circumstances. On this subject it is insisted that paragraph 12 is an "Act of Congress" not a "rule, regulation or practice," and is not referred to at all in paragraph 15.

X.

The said Circuit Court of Appeals erred in reaching the following conclusion:

"Even if the District Court had been right in refusing the motion to dismiss the bill the order of injunction could not stand, because the execution of the order of the Interstate Commerce Commission could be enjoined only by three judges, one of them being a circuit judge, after notice to the Commission and to the Attorney General."

It is insisted that this is not a cause in which it is sought to enjoin an order of the Interstate Commerce Commission. This on the ground that paragraph 12, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920, is a substantive act of Congress imposing on carriers by railroad certain duties and that failure on the part of the defendant railroad company to comply with the provisions of that act, causing the injuries alleged in the bill warrants injunctive relief without regard to anything the Interstate Commerce Commission may have done.

XI.

That said Circuit Court of Appeals erred in its interpretation of clause "D," paragraph 15 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920, which reads "(d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them," as referring to or including in its provisions paragraph 12. It is insisted that clause "D" refers only to preferences or priorities in transportation, embargoes or movement of traffic under permits and does not include or in any manner refer to paragraph 12, which deals exclusively with the distribution of the available cars among coal mines.

Wherefore, the said Lambert Run Coal Company prays that the said decree of the said Circuit Court of Appeals be reversed, and that it enter such decree as may be directed by the Supreme Court of the United States.

JOHN A. HOWARD,
BUTLER, LAMB, FOSTER AND POPE,
Of Counsel for Lambert Run Coal Company.

ORDER ALLOWING APPEAL.

Filed September 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

On motion of John A. Howard, solicitor and counsel for Lambert Run Coal Company, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein, on the twelfth day of August, 1920, be, and the same is hereby allowed, as prayed, and that a certified transcript of the record, testimony, exhibits, affidavits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $1,000.00, as a bond for costs and damages on appeal. Said bond to be executed and filed in the Clerk's Office of this Court within fifteen days from this date, and approved by the undersigned.

Sept. 10, 1920.

C. A. WOODS,
U. S. Circuit Judge.

CITATION.

Issued September 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

UNITED STATES OF AMERICA, ss:

The President of the United States:

To the Baltimore and Ohio Railroad Company, Appellant in the above styled cause—Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit from a final decree rendered and entered on the twelfth day of August, 1920, in that suit being in equity No. 1846, wherein Baltimore & Ohio Railroad Company is Appellant and Lambert Run Coal Company is Appellee, to show cause, if any there be, why the decree rendered and entered against the said appellee, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable C. A. Woods, United States

Circuit Judge for the Fourth Circuit, this 10th day of September, 1920.

C. A. WOODS,
U. S. Circuit Judge.

Legal service of the above citation is accepted this 13th day of September, 1920.

GEO. M. HOFFHEIMER,
Of Counsel for B. & O. R. R. Company.

APPEAL BOND.

Filed September 15, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

KNOW ALL MEN BY THESE PRESENTS, that we, Lambert Run Coal Company, a corporation, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto The Baltimore and Ohio Railroad Company, a corporation incorporated under the laws of the State of Maryland, in the full and just sum of $1,000.00 to be paid to said Baltimore and Ohio Railroad Company above named, its successors and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these pres-

ents. Sealed with our seals and dated this 13th day of September in the year of our Lord One Thousand Nine Hundred and Twenty. Whereas, lately at a court held by the United States Circuit Court of Appeals for the Fourth Circuit in a suit depending in said court between Baltimore & Ohio Railroad Company vs. Lambert Run Coal Company a decree was rendered and entered against the said Lambert Run Coal Company on August 11, 1920. And the said Lambert Run Coal Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit and a citation directed to said Baltimore & Ohio Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof.

NOW, condition of the above obligation is such that if the said Lambert Run Coal Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

LAMBERT RUN COAL CO., (Seal)
By CLARENCE D. ROBINSON, Secy. & Tr.
FIDELITY AND DEPOSIT CO. OF MD., (Seal)
By TUSCA MORRIS, Attorney in Fact.
CHAS. W. EVANS, Agent.

(Seal of Surety Co.)

Approved:
C. A. WOODS,
U. S. Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains

upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 18th day of September, A. D., 1920.

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

(Seal of Court)

FILED
OCT 22 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 153

LAMBERT RUN COAL COMPANY, *Appellant*,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, *Appellee*.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION TO ADVANCE.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Counsel for Appellant.

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 585.

LAMBERT RUN COAL COMPANY, *Appellant*,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, *Appellee*.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION TO ADVANCE.

Come now counsel for the above-named appellant and respectfully move the Court to advance the above entitled cause for early hearing during the October, 1920, term of this Court.

This appeal involves the construction of paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act. Both of these paragraphs were incorporated in the Act by the Transportation Act, 1920, and neither of them has been construed by this Court.

Paragraph (12) provides that during any period in which the supply of cars available for transporta-

tion of coal on any railroad does not equal the requirements of the mines served by it, it shall be the duty of the carrier "to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for the transportation of coal against the mine."

It is claimed by appellant in its bill of complaint, which was filed on behalf of itself and all others similarly situated, that this provision does away with the use of what are known as "assigned cars" and requires the distribution, during any period of coal car shortage, of all coal cars on appellee's railroad on the basis of the respective mine ratings of the mines served by it, and that the carrier is not permitted to adopt any method of coal car distribution inconsistent with this requirement, either of its own motion or by authority of the Interstate Commerce Commission.

It appears from the record, however, that at the time of the hearing of this cause in the District Court, the appellee was distributing coal cars, not in accordance with the requirement of paragraph (12) as construed by appellant, but in accordance with certain regulations authorized by an order or recommendation of the Interstate Commerce Commission applying to all railroads, under which certain mines receive "assigned cars" in excess of the number called for by their mine ratings, and others, including the appellant's, receive fewer cars than their ratings call for. This order, which appears at page 42 of the record, purports to be made under the authority of paragraph (15) of Section 1, which confers on the Commission certain summary powers, to be exercised whenever it is of opinion "that shortage of equip-

ment, congestion of traffic or other emergency requiring immediate action exists in any section of the country."

The District Court for the Northern District of West Virginia sustained the contentions of appellant and granted an injunction *pendente lite* against the continuance of the appellee's method of car distribution. On appeal from this order to the Circuit Court of Appeals for the Fourth Circuit, it was held by that court that the order of the Interstate Commerce Commission above referred to was within the jurisdiction of the Commission and a decree was entered remanding the cause to the District Court with directions to dissolve the injunction and dismiss the bill. This appeal is prosecuted to reverse that decree.

The District Court of the United States for the Northern District of Alabama has also rendered a decision sustaining the jurisdiction of the Interstate Commerce Commission, but upon grounds materially different from those set forth in the opinion of the Circuit Court of Appeals in this cause. Cases involving the same questions are pending in the District Courts for the Southern District of West Virginia and the Western District of Pennsylvania.

The practice of assigning cars to certain mines in excess of their ratable shares works a serious hardship to appellant and other operators who receive no assigned cars, not only by reason of the decrease of production and increase of unit production cost which results directly from the reduction of their car supply, but because of the marked competitive advantage which the beneficiaries of the practice enjoy. It is obviously of peculiar importance to the appellant and all others similarly situated that the question whether

the method of car distribution which subjects them to these disadvantages is warranted by law, should be promptly decided.

The interest of the coal consuming public in an early decision of this controversy is, however, even greater than that of the litigants. The supply and distribution of coal cars is one of the controlling factors not only in the distribution of coal but in its production and price. The stocks of coal on hand in many sections of the country are smaller than ordinary prudence requires at this season of the year. Experience indicates that a shortage of coal cars in inevitable in the winter season, and as the country during the coming winter will be dependent to an unusual degree on the current production of coal for its requirements, a high degree of efficiency in the use of the available facilities for production and distribution will be essential.

If, in this situation, the question whether the distribution of coal cars is controlled by a definite statutory requirement or is subject to discretionary regulation by the Interstate Commerce Commission is left to depend upon litigation in inferior Federal courts, different rules may be established for different railroads or for the same railroad in different regions, with the inevitable result of confusion and loss of efficiency. It is therefore of the highest importance not only to the coal industry and the railroads but to the general public that the questions presented on this appeal should be authoritatively settled by this Court at the earliest possible moment.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Counsel for Appellant.

Supreme Court, U. S.
FILED
NOV 9 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 153

LAMBERT RUN COAL COMPANY,
Petitioner,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

PETITION OF LAMBERT RUN COAL COMPANY FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Solicitors and of Counsel for Petitioner.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. .....

LAMBERT RUN COAL COMPANY,

Petitioner,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Lambert Run Coal Company, respectfully shows to the Court:

That there is pending in this Court, on appeal from the United States Circuit Court of Appeals for the Fourth Circuit, case Number 585, *Lambert Run Coal Company, Appellant* v. *Baltimore & Ohio Railroad Company, Appellee.* As hereinafter set forth, this case involves questions of vital importance not only to the litigants but to the general public, and it is believed that

if, for any reason, it should be held that this Court is without jurisdiction of the appeal above referred to, the decision of the Circuit Court of Appeals should nevertheless be reviewed by writ of certiorari.

That petitioner filed its sworn bill in equity on behalf of itself and all others similarly situated, against The Baltimore and Ohio Railroad Company on June 19, 1920, in the Circuit Court of Marion County in the State of West Virginia. The bill alleged:

That the defendant was a carrier of persons and property in interstate commerce, and as such was subject to the provisions of the Interstate Commerce Act, and that paragraph (12) Section 1 of said act provides as follows:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States." (Rec., 7.)

That petitioner owned and operated a coal mine served by defendant, and that although at the time of the commencement of the suit and for a long time prior thereto there had not been sufficient cars on defendant's line available for the transportation of coal to meet the requirements of the mines served by it, defendant had not

mplied with the provision of said paragraph (12) Sec-
on 1 of the Interstate Commerce Act in the distribu-
on of such cars, in that while it had established just
nd reasonable ratings of the mines served by it, as
equired by the statute, it had failed and refused to
aintain and apply such ratings and count each and
very car furnished to or used by a mine for transpor-
tion of coal against that mine, but on the contrary had
rnished to certain mines cars in excess of the number
which they would have been entitled if their respec-
ve mine ratings had been applied, as required by the
atute, and had furnished to others, including peti-
oner, a smaller number of cars than they were entitled
on the basis of their mine ratings. (Rec., 10.)

That this unlawful method of distribution was carried
n pursuant to certain car distribution rules established
y defendant which were set forth in an exhibit to the
ll (Rec., 31-34) and which authorized the assignment
f cars for the shipment of railway fuel and of privately-
wned cars in excess of the number called for by the rat-
gs of the mines receiving them.

It further appeared from the allegations of the bill
at as it is impracticable for the petitioner to store coal
t its mine, the mine cannot be operated unless cars are
pplied to load the coal as and when it is mined (Rec.,
)), and that the reduced working time caused by the
ilure of the carrier to supply petitioner's mine with its
ll proportion of the available cars materially con-
ibutes to produce the following injurious results to the
etitioner.

The profits from the operation of its mine are directly
educed not only by reason of the reduction in the amount
f coal which it can produce and sell, but by reason of
ie material increase in unit cost of production which

accompanies a reduction in working time without a corresponding reduction in overhead expense. (Rec., 20-21.)

Petitioner's customers have become dissatisfied and the good will of its business has been seriously impaired. (Rec., 21.)

Petitioner's better and more efficient employees tend to leave its employ and secure work in mines which are able to offer more steady employment by reason of having preference in car supply, and petitioner's working force is thus progressively demoralized. (Rec., 21.)

On the other hand mines which receive assigned cars in excess of their proportionate share are thus enabled to keep down their unit costs of production, and to maintain and increase the efficiency of their organizations, with the result that they enjoy marked competitive advantages over petitioner and others similarly situated. (Rec., 21.)

The bill further alleged that the existing car shortage would continue for a long time (Rec., 10), and that defendant would, unless restrained by injunction, continue the above described illegal method of car distribution, and petitioner would continue to suffer the injuries resulting therefrom, and prayed an injunction restraining defendant from observing or enforcing Rules 8, 9 and 10 of the car distribution rules above referred to, or any other rules or practices inconsistent with the requirement of said paragraph (12), Section 1 of the Interstate Commerce Act. (Rec., 22-23.)

On the petition of the defendant (Rec., 38-41), the case was removed to the United States District Court for the Northern District of West Virginia, and a transcript of the record in the Circuit Court of Marion County having been duly filed in the District Court, the defendant presented its motion to dismiss and its answer.

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The motion to dismiss attacked the jurisdiction of the court on the ground that it did not appear that any complaint as to the matter alleged in the bill had been made to the Interstate Commerce Commission or that the Commission had acted in respect thereto, and alleged that the car distribution rules complained of were in fact rules of the Interstate Commerce Commission, that the suit was one to restrain the enforcement of an order of the Commission and that the United States and the Commission were necessary parties to the case. (Rec., 84-85.)

The answer (Rec., 85-93), did not deny that the bill had correctly alleged the facts as to the defendant's method of car distribution nor did it controvert in any way the allegations of the bill as to the injuries resulting to the petitioner therefrom, but alleged that the rules and practice complained of by the petitioner were in all respects according to law and were authorized by an order of the Interstate Commerce Commission dated April 15, 1920, reading as follows:

"NOTICE TO CARRIERS AND SHIPPERS:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel laoding in accordance with the decisions of the In-

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terstate Commerce Commission in *R. R. Comm. of Ohio, et al.* v. *H. V. Ry. Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned cars.' All other cars will be designated as "unassigned' cars.

The Commission is of the opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act, as amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of rule 8 modified as above, effective April 15, 1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. MCGINTY,
Secretary."
(Rec., 105.)

Amended Rule 8 as set forth in this order is identical with No. 8 of the rules of the defendant referred to in petitioner's bill, and is the principal object of the petitioner's attack.

The cause came on to be heard in the District Court on June 29, 1920, on the petitioner's motion for an injunction *pendente lite*, supported by the sworn bill and affidavits, and on the defendant's motion to dismiss. (Rec., 107.) The court held that paragraph (12) Section 1 of the Interstate Commerce Act prescribed a definite rule for the distribution of coal cars during periods of car shortage, and that paragraph (15) of the same section, under which the order of the Interstate Commerce Commission above set forth and the existing practice of the defendant were sought to be justified, conferred no power or jurisdiction on the Commission to authorize or require any deviation from that rule. The court held further that the existing practice of the defendant of

furnishing to certain mines more cars, and to others, including the petitioner's mine, less, than their respective ratings called for, was in violation of paragraph (12), and it therefore denied the defendant's motion to dismiss and granted a temporary injunction as prayed in the bill. (Rec., 107-108.)

The defendant appealed from this order of injunction to the Circuit Court of Appeals for the Fourth Circuit, and the cause was docketed in that court under the title: *The Baltimore and Ohio Railroad Company, Appellant, v. Lambert Run Coal Company, Appellee,* No. 1846. The Court of Appeals sustained the contention of petitioner and the holding of the District Court that the defendant's method of car distribution did not conform to the requirement of paragraph (12), but held that under clause (d) of paragraph (15) of the same section, the Interstate Commerce Commission was authorized in emergencies to make directions for the distribution of coal cars in a different manner from that provided by paragraph (12) and that the order of April 15, 1920, was a valid exercise of that power, and for this reason, on August 12, 1920, it reversed the injunction order, and remanded the cause to the District Court with directions to dissolve the injunction and dismiss the bill. (Rec., 123-130.)

It is submitted that if this Court has not jurisdiction of the appeal from this decree, the decision of the Circuit Court of Appeals should be reviewed by writ of certiorari for the following reasons:

1. Paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act were introduced into that act by the Transportation Act, 1920, and have not been construed by this court. The construction of these provisions, so far as they relate to the distribution of coal cars,

is of vital importance not only to shippers of coal but to the consuming public.

2. It is held by the Circuit Court of Appeals that the car distribution practice of the defendant does not conform to paragraph (12), but that under a provision of paragraph (15), which authorizes the Interstate Commerce Commission in case of any emergency requiring immediate action "to give directions for preference or priority in transportation, embargoes or movement of traffic under permits," the Commission had power to prescribe a different method of car distribution from that required by paragraph (12). In view of the fact that by the express terms of paragraph (12), the rule which it prescribes is made applicable to any and every period of car shortage, this power to prescribe a different rule necessarily involves a power to suspend the operation of paragraph (12). It is therefore submitted that the decision of the Court of Appeals conflicts with the well established rule that the administrative authority of the Commission is subordinate to all the substantive provisions of the statute, and does not extend to dispensing with any of its requirements, or sanctioning practices which the statute forbids.

3. The departure which the Commission has sanctioned and the Court of Appeals has sustained, from the rule of equality in coal car distribution prescribed by Congress, is of serious public consequence. Not only does it subject producers of coal to the loss and damage alleged in the bill, but it enables the railroads which consume about one-third of all bituminous coal produced in the United States, to shift the entire burden of the increase in cost of coal which is caused by car shortage to the shoulders of private and industrial consumers.

4. Paragraph (12) clearly expresses the intent of

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Congress to prescribe a uniform rule of car distribution, and this intent will be defeated unless the question of its construction and effect is promptly and finally determined by this court. The Circuit Court of Appeals has held in this case that paragraph (12) is "an imperative enactment against the assigned car rule in times of ordinary coal car shortage." (Rec., 128.) We file herewith a certified copy of an opinion handed down by the United States District Court for the Northern District of Alabama in the case of *Corona Coal Company* v. *Southern Railway Company,* in which it is held that paragraph (12) does not prohibit the use of assigned cars at any time. Suits involving the same question are now pending in the Southern District of West Virginia and the Western District of Pennsylvania, and in view of the situation of coal operators who do not receive assigned cars it is improbable that other suits will not be brought. An authoritative decision by this court is, therefore, necessary to avoid the confusion which will be produced by the existence of different rules for car distribution for different railroads or for the same railroad in different districts.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this court and directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record in all proceedings of said Circuit Court of Appeals in said cause entitled *The Baltimore and Ohio Railroad Company, appellant,* v. *Lambert Run Coal Company, appellee,* No. 1846, to the end that the said cause may be reviewed and determined by this court as provided in Section 240 of the Judicial Code; that said order and decree of the Circuit Court of Appeals in said cause may be re-

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versed by this court, and that your petitioner may have such other and further relief in the premises as to the court may seem proper.

LAMBERT RUN COAL COMPANY,
Petitioner,
By RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Its Solicitors.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Solicitors and of Counsel for Petitioner.

IN THE

Supreme Court of the United States.

October Term, A. D. 1920.

No. .....

LAMBERT RUN COAL COMPANY,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE RECORD IN THIS CASE PRESENTS THE FOLLOWING QUESTIONS:

1. WHETHER PARAGRAPH (12) SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THAT DURING COAL CAR SHORTAGES, EVERY CARRIER BY RAILROAD SHALL APPLY THE MINE RATINGS OF ALL MINES SERVED BY IT, AND DISTRIBUTE ALL AVAILABLE COAL CARS IN ACCORDANCE WITH SUCH RATINGS.

2. WHETHER, ASSUMING THAT PARAGRAPH (12) DOES IMPOSE THIS REQUIREMENT, THE INTERSTATE COMMERCE COMMISSION, ACTING UNDER THE EMERGENCY POWERS CONFERRED BY PARAGRAPH (15) OF THE SAME SECTION, HAS AUTHORITY TO SUSPEND THE CAR SHORTAGE PROVISION OF PARAGRAPH (12), AND DIRECT THAT MINE RATINGS SHALL NOT BE APPLIED.

THESE QUESTIONS ARE NOVEL, AND OF EXTREME IMPORTANCE, NOT ONLY TO PETITIONER AND ALL OTHER COAL PRODUCERS, BUT TO THE GENERAL PUBLIC.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THE INTERSTATE COMMERCE COMMISSION'S ORDER DIRECTING A METHOD OF CAR DISTRIBUTION DIFFERENT FROM THAT PRESCRIBED BY PARAGRAPH (12), WAS A VALID EXERCISE OF THE AUTHORITY CONFERRED ON THE COMMISSION BY PARAGRAPH (15), NECESSARILY INVOLVES THE ERRONEOUS PROPOSITION THAT THE COMMISSION, IN THE EXERCISE OF A PURELY ADMINISTRATIVE POWER, MAY SUSPEND THE OPERATION OF A SUBSTANTIVE PROVISION OF THE INTERSTATE COMMERCE ACT, RELIEVE THE CARRIERS OF A SPECIFIC DUTY IMPOSED BY THAT PROVISION, AND PRESCRIBE A RULE IMPOSING A DIFFERENT DUTY.

III.

THE QUESTION OF THE LEGALITY OF THE METHOD OF CAR DISTRIBUTION PRACTICED BY THE RESPONDENT IS NOT ONLY OF VITAL IMPORTANCE TO THE PETITIONER AND ALL COAL PRODUCERS SIMILARLY SITUATED, BUT IT IS ALSO A MATTER OF SERIOUS PUBLIC CONSEQUENCE, SINCE THE RAILROADS ARE ENABLED BY THE USE OF THIS METHOD TO SHIFT THE ENTIRE BURDEN OF THE INCREASED COST OF COAL CAUSED BY CAR SHORTAGE TO OTHER COAL CONSUMERS.

IV.

THERE IS A DIVISION OF OPINION IN THE FEDERAL COURTS AS TO THE CONSTRUCTION AND EFFECT OF PARAGRAPH (12), AND AN AUTHORITATIVE DECISION BY THIS COURT IS NECESSARY IN ORDER TO PREVENT UNCERTAINTY AND CONFUSION AS TO THE PRINCIPLE OF COAL CAR DISTRIBUTION WHICH IT ESTABLISHES.

ARGUMENT.

I.

THE RECORD IN THIS CASE PRESENTS THE FOLLOWING QUESTIONS:

1. WHETHER PARAGRAPH (12) SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THAT DURING COAL CAR SHORTAGES, EVERY CARRIER BY RAILROAD SHALL APPLY THE MINE RATINGS OF ALL MINES SERVED BY IT, AND DISTRIBUTE ALL AVAILABLE COAL CARS IN ACCORDANCE WITH SUCH RATINGS.

2. WHETHER, ASSUMING THAT PARAGRAPH (12) DOES IMPOSE THIS REQUIREMENT, THE INTERSTATE COMMERCE COMMISSION, ACTING UNDER THE EMERGENCY POWERS CONFERRED BY PARAGRAPH (15) OF THE SAME SECTION, HAS AUTHORITY TO SUSPEND THE CAR SHORTAGE PROVISION OF PARAGRAPH (12), AND DIRECT THAT MINE RATINGS SHALL NOT BE APPLIED.

THESE QUESTIONS ARE NOVEL, AND OF EXTREME IMPORTANCE, NOT ONLY TO PETITIONER AND ALL OTHER COAL PRODUCERS, BUT TO THE GENERAL PUBLIC.

The questions arising upon the record in this case depend wholly upon the construction and effect of paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act, which are set forth in full in the margin.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do

Paragraph (12) provides that during any period in which the cars available for the transportation of coal upon a carrier's line do not equal the requirements of the mines served by it, it shall be the duty of the carrier "to maintain and apply just and reasonable ratings of such mines, and to count each and every car furnished to or used by any such mine for the transportation of coal against the mine."

It is contended on behalf of petitioner that this provision requires all available coal cars on the line of a carrier to be distributed among all the mines served by it in proportion to their several ratings, and that it prohibits the method of car distribution provided by the

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shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including mainline track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

rules of the defendant, and commonly known as the "assigned car" practice.

Under this practice cars for railway fuel and privately owned cars, called assigned cars, are furnished to certain mines in excess of the number of cars to which such mines would be entitled on the basis of their mine ratings.

The Circuit Court of Appeals sustained petitioner's contention that this practice did not conform to the provision of paragraph (12), above referred to, but held that under Clause (d) of paragraph (15) the Interstate Commerce Commission was authorized, during car shortages "so much beyond the usual as to constitute an emergency," to prescribe a different rule, and that the Commission's order of April 15, 1920, which directed the adoption of the assigned car rule, was a valid exercise of this authority.

The view taken by the Court of Appeals as to the meaning of the language used in paragraph (12) is contrary to the position taken by respondent in that court, and it is contended by petitioner that the court is in error in its position as to paragraph (15). Both of these provisions were introduced into the Interstate Commerce Act by the Transportation Act, 1920, and neither has been construed by this court. In view of the novelty of the questions involved, and especially because of their importance not only to the litigants, but to the general public, it is believed that they should be determined by this court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THE INTERSTATE COMMERCE COMMISSION'S ORDER DIRECTING A METHOD OF CAR DISTRIBUTION DIFFERENT FROM THAT PRESCRIBED BY PARAGRAPH (12), WAS A VALID EXERCISE OF THE AUTHORITY CONFERRED ON THE COMMISSION BY PARAGRAPH (15), NECESSARILY INVOLVES THE ERRONEOUS PROPOSITION THAT THE COMMISSION, IN THE EXERCISE OF A PURELY ADMINISTRATIVE POWER, MAY SUSPEND THE OPERATION OF A SUBSTANTIVE PROVISION OF THE INTERSTATE COMMECE ACT, RELIEVE THE CARRIERS OF A SPECIFIC DUTY IMPOSED BY THAT PROVISION, AND PRESCRIBE A RULE IMPOSING A DIFFERENT DUTY.

The Court of Appeals expressly held that paragraph (12) constituted "an imperative enactment against the assigned car rule in times of ordinary coal car shortage." It sustained the order of the Interstate Commerce Commission and the car distribution rule which it sanctioned, on the theory that in emergencies a discretion was vested in the Commission to prescribe a method of car distribution different from that provided in paragraph (12), by the following language of paragraph (15):

> "Whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, the Commission shall have and is hereby given authority * * * (d) to give directions for preference or priority in transportation, embargoes and movement of traffic under permits at such time and for such periods as it may determine, and to modify, change, suspend or annul them."

This theory is apparently based on the view that Congress intended the "imperative enactment" contained in paragraph (12) to provide only for "ordinary" coal car

shortages, and left extraordinary shortages to be dealt with by the Commission under paragraph (15). Congress did not, however, so limit the operation of paragraph (12). The rule which it prescribed in that paragraph is expressly made applicable "during *any* period" of car shortage, and even if it be granted that the Commission is given power under paragraph (15) to apply a different rule in the case of an unusually acute shortage, it is plain that unless and until the Commission exercises that power, the rule prescribed by paragraph (12) will remain operative. In other words, since the rule prescribed by Congress in terms includes any and every coal car shortage, any power which the Commission may have in the premises is necessarily a power, not, as the Court of Appeals appears to have thought, to make provision for a situation for which Congress has not specifically provided, but to suspend the operation of the rule provided by Congress and prescribe another rule in its place.

The decision of the Court of Appeals therefore necessarily rests upon the proposition that the authority of the Commission "to give directions" conferred by clause (d) of paragraph (15) includes the authority to suspend the operation of the car shortage provision of paragraph (12). And since paragraph (15) makes the Commission the sole and final judge of the question whether an existing emergency calls for the exercise of its emergency powers, it is evident that the Commission might declare any and every coal car shortage to be such an emergency and give "directions" which would effectually prevent the rule prescribed by Congress in paragraph (12) from ever becoming operative and substitute for it a rule prescribed by the Commission.

We have believed the doctrine well established that

the administrative authority of the Interstate Commerce Commission was conferred in furtherance of the purposes and provisions of the Interstate Commerce Act, and was limited and controlled by all its substantive provisions. The holding of the Circuit Court of Appeals in this case that a mere administrative authority "to give directions" can be construed as conferring upon the Commission discretionary power to dispense with such a provision is, so far as we are advised, without any precedent, and we feel justified in asking this court to determine whether it shall become one.

III.

THE QUESTION OF THE LEGALITY OF THE METHOD OF CAR DISTRIBUTION PRACTICED BY THE RESPONDENT IS NOT ONLY OF VITAL IMPORTANCE TO THE PETITIONER AND ALL COAL PRODUCERS SIMILARLY SITUATED, BUT IT IS ALSO A MATTER OF SERIOUS PUBLIC CONSEQUENCE, SINCE THE RAILROADS ARE ENABLED BY THE USE OF THIS METHOD, TO SHIFT THE ENTIRE BURDEN OF THE INCREASED COST OF COAL CAUSED BY CAR SHORTAGE TO OTHER COAL CONSUMERS.

The practical importance to the petitioner and all producers of coal similarly situated, of the question presented by the record is sufficiently indicated by the uncontroverted allegations of the bill as to the injurious results of the "assigned car" practice to operators who do not receive such cars, which are stated in the petition.

The evils resulting from this practice are, however, by no means confined to the coal industry. An increase in the unit cost of coal production inevitably accompanies a shortage of cars, for the reason that a car shortage necessarily curtails production while overhead expense remains constant, and this increase in cost must ulti-

mately be borne in large part by the consumer. If there is discrimination in the distribution of the available supply of cars during such a shortage, the consumer of coal whose supply comes from the less favored mines will obviously be saddled with a relatively large share of this burden.

Under the rule sustained by the Court of Appeals in this case, such discrimination may be practiced to the extent of supplying mines loading railway fuel with a full supply of cars no matter how acute the general car shortage may be, with the result that the unit production cost at such mines will remain normal, while production costs at other mines will reflect not only the general condition of car shortage but will be further increased by reason of the reduction in the number of cars available for general distribution due to the preference of railway fuel mines. In this situation domestic and industrial consumers will be compelled to absorb not only their own proportionate share of the increased cost of coal due to the failure in car supply, but the share of the railroads as well. As the railroads consume one-third of the bituminous coal produced in the United States, it is obvious that the cost of carrying them through a severe car shortage will constitute a considerable item in the coal bill of the general public.

In this connection it should not be forgotten that it is the duty of the carrier to furnish an adequate supply of cars. No doubt car shortages frequently occur from causes beyond the control of the carrier and without any failure in its duty, but it cannot be assumed that this is true always and everywhere, and the assigned car rule may therefore become an instrument by which a carrier can indemnify itself against the consequence of its own default in the performance of its public duty.

In any event the private consumer is in no way responsible for a failure in car supply, and we believe that the question whether Congress has authorized the Interstate Commerce Commission to sanction a practice which enables the railroad to levy a tax on him to pay the expense of frequently recurring car shortages may fairly be urged on this court as one of public and general interest, which warrants the issuance of the writ of certiorari in this case.

IV.

THERE IS A DIVISION OF OPINION IN THE FEDERAL COURTS AS TO THE CONSTRUCTION AND EFFECT OF PARAGRAPH (12), AND AN AUTHORITATIVE DECISION BY THIS COURT IS NECESSARY IN ORDER TO PREVENT UNCERTAINTY AND CONFUSION AS TO THE PRINCIPLE OF COAL CAR DISTRIBUTION WHICH IT ESTABLISHES.

It is clear that Congress intended by paragraph (12) to establish a uniform principle for the regulation of car distribution. This intention will be defeated unless the construction of that paragraph is authoritatively determined by this court.

A conflict of opinion as to the meaning and effect of this provision has already arisen. As we have pointed out, the Circuit Court of Appeals has expressly held in this case that paragraph (12) is an "imperative enactment against the assigned car rule in times of ordinary coal car shortage." The opinion handed down by the United States District Court for the Northern District of Alabama in the case of *Corona Coal Company* v. *Southern Railway Company*, a certified copy of which was filed with the petition, and which is printed as an appendix to this brief, adopts the view that paragraph

(12) does not prohibit the use of assigned cars at any time.

Suits involving the same question are now pending in the Western District of Pennsylvania and the Southern District of West Virginia, and in view of the vital importance of the question to coal operators who do not receive assigned cars it is highly probable that other suits will be instituted. It is evident that a situation may easily arise in which different rules will prevail for different railroads, or for the same railroad in different districts, unless a decision by this court puts an end to the controversy.

This consideration has peculiar weight at the present time. It is matter of common knowledge that the reserve stocks of coal in the United States are smaller than is normal or prudent at this season. Experience indicates that a shortage of coal cars is inevitable during the winter, and as the country will be dependent to an unusual extent during the coming winter on current production of coal, and that production is dependent on car supply, it is obviously of the greatest importance that the law governing the distribution of the available supply of coal cars should not be left in the confusion and uncertainty which will arise from conflicting decisions in inferior federal courts.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Solicitors and of Counsel for Petitioner.

APPENDIX.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

At Birmingham.

Corona Coal Company, *Plaintiff*,
vs.
Southern Railway Company, *Defendant*.
} In Equity.

Bill to enjoin the defendant and for damages.

Motion to dissolve the interlocutory injunction issued by the State Court. Motion granted.

Johnston & Cocke, of Birmingham, Alabama, and Rush C. Butler, of Chicago, Illinois, Attorneys for Plaintiff.

S. R. Prince, of Washington, D. C., and J. T. Stokely, of Birmingham, Alabama, Attorneys for Defendant.

Henry D. Clayton, District Judge.

The Plaintiff, a Delaware corporation, engaged in the business of mining coal, filed its bill in the Circuit Court of Jefferson County, Alabama, against the defendant Railway, a Virginia corporation. A State Judge granted an interlocutory injunction as prayed for in the bill. The case was removed to this Court and is now submitted on the defendant's motion to dissolve the injunction and on the pleadings, the bill and the answer, each verified,

and affidavits in support of, and in opposition to, the motion.

The basis of the plaintiff's complaint is that the defendant, in the distribution of coal cars to mines located on its railroad in the Birmingham mining district, is violating to the injury of the plaintiff, the provisions of Paragraph 12 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, which paragraph is in these words:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines, or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

The pleadings, affidavits and arguments show that the real issue between the parties is on account of the practice pursued by the defendant in respect to "assigned" cars; that is to say, the defendant delivers its own cars to mines with which it has contracts for fuel for its own use and delivers the cars belonging to other railroads and privately owned cars committed to it for transportation to mines with which said other railroads and owners have contracts for fuel. It is established, indeed, it is not controverted that such cars are counted against the

distributive share of the mines to which assigned, and that such mines are not given a share of the cars available for ordinary commercial shipments unless, and to the extent only, that the assigned cars fail to equal the distributive share of these mines, which receive the assigned cars. The Defendant contends that it has the right to deliver its own cars in any number which may be necessary to obtain fuel to operate its trains, and that the other railroads and private owners have the right to require that the defendants deliver their cars to the mines with which they have contracts for coal—that the possession of such cars was committed to them in each case for that specific purpose. It is further urged by the defendant that during the period of a car shortage, the practice complained of by the plaintiff is necessary in order to enable the defendant and the other railroad Companies to comply with their contracts for fuel supply; and that if a different course be pursued during the periods of car shortage, the defendant and the other railroads would violate their contracts and be compelled to go into the open market for the fuel necessary for the operation of their railroads and compete in the purchase of coal with industrial enterprises and domestic concerns; and would probably have to pay whatever price the coal operators might demand at the time; or, else, the defendant and such other railroads would be forced to confiscate coal for the operation of their trains. It is conceded that confiscation is a vicious practice and not justifiable except in case of extreme necessity.

The defendant urges that the practice complained of is not only in the exercise of a right but is in pursuance of the duty it owes to the traveling and shipping public, to operate its trains, and that if such other railroads and owners of cars committed to defendant for the spe-

cific purpose stated could not have the use of their cars, they would cease to deliver them to the defendant; and that in the case of the said other railroads and owners of private cars, the defendant owed the duty to carry out the purpose for which the cars were committed to it; and further, that the defendant has the common law right to pursue such practice, and has the authority of the Interstate Commerce Commission, clothed with power in such matters, to do this, which authority is in the form of the notice of April 15, 1920, as follows:

"INTERSTATE COMMERCE COMMISSION,
WASHINGTON, April 12, 1920.

Notice to Carriers and Shippers: The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrates that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that Rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decision of the Interstate Commerce Commission in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned cars.' All other cars will be designated as 'unassigned' cars.

The Commission is of the opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act as

amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of rule 8 modified as above, effective April 16, 1920, and until further direction or order of the Commission.

By the Commission: George B. McGinty, Secretary."

The answer and motion to dissolve the injunction raises the question of whether or not the coal company has appealed to the proper tribunal for redress of the alleged grievance. The railroad insists that the coal mining company should have first gone with its complaint to the Interstate Commerce Commission, which, it is contended, has primary jurisdiction over the controversy between the plaintiff and defendant.

The decision of the question turns upon the effect to be given to paragraph 12, Sec. 1 of the Interstate Commerce Act, as amended by Sec. 402 of the Transportation Act of 1920, herein set out.

In considering the effect and scope of this paragraph, the high and comprehensive administrative powers and duties of the Interstate Commerce Commission must not be forgotten. And it is well to remember that the Acts of Congress furnish repeated evidence of a legislative policy to broaden and add to rather than to narrow and subtract from the powers and useful work of the Commission. Again it is to be borne in mind that the Supreme Court of the United States had often, in interpreting the Interstate Commerce Act and the amendments thereto, given judicial recognition of this legislative policy.

I think the paragraph 12 quoted should be considered and construed in the light of this knowledge, as well as

in pari materia with the other related sections of the Interstate Commerce Law.

Let it be observed that before the passage of the Act of 1920, it was often held by the Commission and the Courts that the carrier should observe just and reasonable rules, regulations and practices with respect to car service; and as a corollary, unjust and unreasonable practices were condemned as unlawful. And the reported cases furnish abundant evidence that the Commission has repeatedly, in cases, somewhat at least resembling this, given redress where just complaints sustained by the evidence have been made.

In the argument of this case, it was admitted by the plaintiff that it had been given by the defendant its proper rating as one of the coal mines on the defendant's railroad. It was also conceded by both parties during the argument that neither the plaintiff nor any other coal mining company in the same district, and on the same railroad, had, in any case during the present car shortage, received a full quota of cars according to the rating of the mine. And it was shown that the defendant did not have a sufficient number of cars to meet the demand of its coal mining patrons.

Prior to the amendment of the Interstate Commerce Law, by the insertion in paragraph 12, the words "and to count each and every car furnished to or used by such mines for transportation of coal against the mines" this rule, now statutory, had been by order of the Interstate Commerce Commission a rule of long standing for the government of railroads; and it had been often sanctioned by the courts in adjudicated cases. So it can be said that this approved rule in effect already law, was by the Transportation Act of 1920, merely crystallized into statutory form. Can it be urged that the fact it is

now embedded in the Transportation Act gives it any more far-reaching or controlling influence over the Commission than it had as a sanctioned rule? Does it subtract from the powers and duties of the Interstate Commerce Commission to see to it in every case that the transportation companies in the matter of car service, follow just and reasonable practices? The Interstate Commerce Commission promulgated the rule as to assigned cars, the Courts sanctioned it and Congress has approved it. Now, must this rule recognized by the Courts as having the force and effect of law, simply because it is at this time a part of the statute, control the question here as the plaintiff insists, or must it be allowed to operate in harmony with the other provisions of the Interstate Commerce Law as it has heretofore, and to the end that the Commission shall have the power to compel the transportation companies to conduct business in a fair, just and reasonable way, in view of all the circumstances arising in the case of car shortage?

Let it be remembered that it was said in the *Penn. R. R. Co.* v. *Puritan Coal Co.* 237 U. S. 121, that

> "* * * it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one unpromulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule or practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative powers which have been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no Court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must

be sought before the Commission or in the United States Courts of competent jurisdiction, as provided in Section 9. But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages occasioned by its violation, or discriminatory enforcement, there is no administrative question involved, the courts being called upon to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage."

This case draws the line of demarkation between that class of complaints which may be heard by the Courts and the other class that must be dealt with by the Commission. If the practice itself is attacked as unfair and discriminatory, the exercise of the judgment and discretion of the Commission is called for, but until that body had declared the practice to be discriminatory and unjust, no Court has jurisdiction of an interstate carrier (defendant here is such) for damages (this bill seeks damages as well as injunction) occasioned by the operation of such practice.

I think it is clear in the instant case that the bill attacks the practice itself, and not the unequal application by the defendant of such practice. *Texas Pacific R. R. Co.* v. *Abilene Cotton Oil Co.* 24 U. S. 426. *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.* 215 U. S. 481, *Morrisdale Coal Co.* v. *Penn. R. R. Co.* 230 U. S. 304. *Loomis* v. *Lehigh Valley R. R. Co.* 240 U. S. 43. And if so, this Court is without jurisdiction at this time to grant relief to the plaintiff. This must be true unless paragraph 12 quoted takes the case from under the influence of the decision in adjudicated cases and out of the primary jurisdiction of the Interstate Commerce Commission during a period of car shortage, such as is shown to exist at this time. It is to be noted that this paragraph 12 that "during any period when the supply of cars available for such service does not equal the requirements of

such mines, it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished and used by such mines for transportation of coal against the mines." Also that paragraph (6) of Section 400 of the Transportation Act of 1920, makes it the duty of common carriers to establish, observe and enforce reasonable and just classifications of property for transportation and all other matters relating to, or connected with, the receiving and transporting of the same, and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful. Paragraph (10) defines car service to include the use, control, distribution, exchange, return of locomotive cars, etc.; further, paragraph (11) makes it the duty of the carrier to furnish safe and adequate car service and to establish, *observe and enforce just and reasonable rules and regulations with respect to car service.* Paragraph (13) authorizes the Commission to require all carriers to file with it rules and regulations with respect to car service, etc.; paragraph (14) empowers the Commission "on complaint or upon its own initiative" to *establish reasonable rules, regulations and practices with respect to car service* by carrier, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, etc." And paragraph (15) *authorizes the Commission in case of shortage of equipment, congestion of traffic or other emergency, upon complaint, or upon its own initiative, to suspend the operation of any, or all, rules, regulations or practices with respect to car service, for such time as may be determined by the Commission; to make just and reasonable direction with respect to car service without regard to the ownership during such emergency which will best promote the service in the interest of the public,* and upon

such terms of compensation as between carriers as they may agree upon, or as the Commission finds to be just and reasonable; and to give directions for preference or priority in transportation, embargoes or movement of traffic under permits, and to modify, change, suspend or annul them. Paragraph (17) provides that the direction of the Commission as to car service, and to the matters referred to in paragraph (15) and (16) may be made through, and by, such agents or agencies as the Commission may designate and appoint for that purpose.

An examination of the Transportation Act shows that Congress has not declared in paragraph 12, or elsewhere, that in a case like the one now here, the pro rata plan of distribution shall be applied to assigned cars according to mine rating, as in the case of ordinary commercial cars; but the statute says no more than such "assigned cars shall be counted against the mine receiving them." What shall be done in a case like the one before me where most of the available cars are assigned cars, Congress has not declared, but has left it, I think, is a matter to be examined into, heard, adjusted and settled, or at least passed upon, by the Interstate Commerce Commission. The effect of the plaintiff's contention is that during the period of inadequate car supply, the carrier must maintain and apply reasonable ratings of the mines which it serves and distribute all available cars in proportion of such ratings, whether such cars, or any or all of them, be assigned cars.

The origin and history of the phrase "*apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mines* for transportation of coal *against the mines,*" shows the reason for its adoption by the Commission and its incorporation, afterwards, into the statute. Congress knew

that at one time assigned cars were not taken into account in the distribution by the carriers to mines served by them, and that the mines receiving assigned cars were given the same pro rata share of the ordinary commercial cars as were given to the mines that received no assigned cars, and that the assigned cars were not counted against the mines favored with them. In *Hocking Valley Case* 12, I. C. R. R. 398, and in the *Traer case*, 13 L. C. R. 451, this practice was complained of and held to be unjust and not to be allowed. When the question came before the Supreme Court of the United States the decision was upheld in *I. C.* v. *Ill. C. R. R. Co.* 215 U. S. 451. It is well to read the opinion in the Traer case rendered by Commissioner Clark, now Chairman of the interstate Commerce Commission.

It may be ventured that Congress did not intend to change the meaning of the phrase "count against the mine" or to enlarge the scope of the rule which is referred to in the *Ill. C. R. R. Co. case, supra*, and the *Morrisdale Coal Co. case, supra.*

In the argument of this case, the statement of Commissioner Clark made before the House Committee on interstate and foreign commerce, when it had under consideration the Esch-Cummings Bill, which put into statutory law the rule found in paragraph 12, hereinbefore referred to, was read to me; and at the same time, the pertinent part of the report of the House Committee was stated. Undoubtedly, this report shows that the House Committee understood what the language "and to count each and every car furnished to or used by such mines for transportation of coal against the mines" meant, and gave legislative sanction, so far as it could, to the application of this rule theretofore adopted by the Commission and approved by the Courts. And from the

hearings of the Committee and its report, it is evident that it was not intended to say assigned cars should in any event be prorated among the mines.

It must be said that the opinions of the Interstate Commerce Commission in *giving the working construction of the Interstate Commerce Act* and its amendments, while not binding upon the Court, is, nevertheless, deserving of serious and deferential consideration. The fact that the Commission made the ruling of April 15, 1920, which is hereinbefore set out, shows it did not consider that paragraph 12 ousted the Commission of its jurisdiction in the matter of coal car distribution during the periods of car shortage, or, in other words, that the Commission was deprived of its administrative power in making distribution of cars in the case of car shortage. As I have said, the statute does not declare that assigned cars shall be prorated. Certainly it does not say that they shall stand idle on the sidetracks of the railroad until the ordinary commercial cars received by mines which have no assigned cars shall equal the number of assigned cars received by, and counted against, the mines furnished with assigned cars. Moreover, there is forceful evidence of the Commission's construction of paragraph 12, found in the words of the Chairman of the Commission, for in the inception of this controversy, and before this bill was brought, this plaintiff here applied to the Chairman of the Commission and received an informal hearing of the very matter involved in this case. At that time, the following statement was made by the Chairman (Mr. Clark):

> "The Chairman: Let me say, in order that there may be no misunderstanding of our view, that some reference has been made to the Transportation Act requiring that the railroads shall count against the mines assigned cars, which left me with the impres-

sion that it was believed that that Act, properly construed, means that a railroad may not use assigned cars if such use results in giving a mine more than its pro rata distribution.

Now, we do not accept that interpretation of it at all. We are very certain that it does not mean that at all. It means just what this Commission laid down as the rule in the Traer case. That is the intention of the Act, and this is the interpretation we place upon it."

On consideration of paragraph 12 and the other provisions of the Transportation Act, and the purpose for which the Interstate Commerce Commission was created and clothed with authority, I am constrained to believe that the plaintiff has presented a case for administrative intervention and not one calling for the exercise of a judicial function. At the expense of repetition, I must say that paragraph 12 does not call for a pro rata division of assigned cars, nor does it say what shall be done with them except that they shall be counted against the mines to which they are assigned. If the plaintiff's interpretation of paragraph 12 should be followed, it would be to read into the statute a provision which it does not contain and which it seems clear that Congress failed, or refused, to write there, or elsewhere, as a part of the Act. It would have been a very easy matter if Congress had adopted the plaintiff's view to have added to paragraph (12) words of this purport: "there shall be distributed to the mines their proportionate number of cars according to mine ratings, whether or not the cars, or any of them, be assigned cars."

Congress did not adopt such idea and for the Courts to adopt it, would be to add to the statute, and would, in effect, also greatly tend to destroy the power and usefulness of the Interstate Commerce Commission in time of distress and car shortage; and cause confusion in the

distribution of cars in the mining districts. This condition would probably extend as a consequence, to other industries. Moreover, for the Courts to assume jurisdiction over cases like the one presented by the plaintiff, would be a suggestion that the Courts be invited to interfere in all similar controversies between mines and railroads. This would force the Courts to go very largely in the business of railroad and mine administration, and thereby, to the extent of such interference, would be imposed insuperable work of mere direction and management, and not of a judicial character. The Courts are not fitted for such duties, but the Interstate Commerce Commission is especially and well designated for that field of usefulness.

It is also urged that the bill is without equity because the plaintiff has a plain and adequate remedy at law. Perhaps so. For whatever injury the plaintiff might sustain by the alleged conduct of the defendant, it might be that damages could be recovered in an action at law; and probably it would be no answer to say that the facts presented here operate to place the plaintiff's cause among that class of rare cases where a Court of Equity may assume jurisdiction of a controversy in order to prevent a multiplicity of suits. See the authorities referred to in *M. L. & W. Power Co.* v. *Charles,* 258 Fed. 726-727. In the view I have taken of this case, it is not necessary for that question to be decided.

I have concluded that the real purpose of paragraph 12 was to carry into the statute what had been a requirement of the Interstate Commerce Commission; that is, that each car must be counted against the mine to which assigned in determining whether the assigned cars equal or exceed the distributive share of such mine; and I believe that all other pertinent questions arising in such a

case as this pending one, were left to the discretion and judgment of the Commission.

The plaintiff's grievance should have been taken to the Interstate Commerce Commission, and, therefore, this Court is without jurisdiction. The motion to dissolve the injunction issued out of the Circuit Court of Jefferson County, Alabama, is granted and the appropriate order will be entered.

Office Supreme Court, U. S.
FILED
FEB 23 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 153

LAMBERT RUN COAL COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 153

LAMBERT RUN COAL COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

STATEMENT.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fourth Circuit, reversing a temporary injunction granted by the United States District Court for the Northern District of West Virginia, and remanding the cause to that court with directions to dissolve the injunction and dismiss the plaintiff's bill.

The bill was filed by the Lambert Run Coal Company against the Baltimore & Ohio Railroad Company in the Circuit Court of Marion County, West Virginia, and was removed on petition of the defendant to the United States District Court for the Northern District of West Virginia. The complainant, a corporation of West Virginia, is engaged in operating a coal mine located on

and served by the defendant's railroad in that state, and filed the bill to enjoin the defendant from continuing certain practices in the distribution of cars to coal mines served by it, alleging that such practices were directly prohibited by the Interstate Commerce Act and that their continuance would cause irreparable injury to the plaintiff for which it had no adequate legal remedy.

On June 29, 1920, the cause came on to be heard in the District Court for the Northern District of West Virginia on the motion of the plaintiff for a temporary injunction and the motion of the defendant to dismiss the bill. The District Court overruled the latter motion and granted a temporary injunction in accordance with the prayer of the bill. The defendant appealed from this order to the Circuit Court of Appeals for the Fourth Circuit with the result indicated in the first paragraph of this statement.

The plaintiff's claim is based on a portion of paragraph (12) of Section 1 of the Interstate Commerce Act. Paragraph (12) was made a part of the Interstate Commerce Act by Section 402 of the Transportation Act, 1920, and reads as follows:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United

States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

The bill of complaint alleges that plaintiff owns and operates a bituminous coal mine in West Virginia having a switch connection with defendant's railroad upon which it is wholly dependent as the initial carrier of all shipments of its coal. (Pr. Rec., 8.)

It is further alleged that defendant has established ratings of the plaintiff's mine and all other mines served by it for the purpose of determining the distribution of coal cars among such mines. These ratings are based on the productive capacity of the respective mines when working full time, and are determined for each month by the performance of the mine for the preceding month under rules adopted by defendant which are set forth in Exhibit A attached to the bill. (Pr. Rec. 27-31.) The rating of plaintiff's mine at the commencement of this suit was 11.5 fifty-ton cars per day. (Pr. Rec., 9.)

The bill raises no question as to the rules by which these ratings are determined or as to the justice or reasonableness of the particular ratings in force at the time the suit was commenced. The claim of the plaintiff is that, having established just and reasonable mine ratings in accordance with the statute, the defendant neglects and refuses during periods of car shortage to apply these ratings and to count cars furnished to or used by any mine for transportation of coal against that mine as the statute requires.

The allegations of the bill relative to this claim are as follows:

The defendant has maintained ratings of the mines served by it for many years. (Pr. Rec., 9.) Prior to the

assumption by the United States of the control of the defendant's railroad and other railroads it was a general practice of many railroads, during periods of coal car shortage to deliver to mines furnishing railway fuel coal, cars for transportation of such coal in excess of the number of cars which such mines would have received if the available supply of cars had been distributed proportionately to the ratings of the several mines served by the particular carrier, a practice which is commonly known as the practice of assigning cars. Under federal control this practice was continued until it came to the attention of the United States Fuel Administrator, who thereupon made representations to the Director General of Railroads that its effect was disastrous to the coal industry and to the consuming public, and urged its discontinuance and the adoption of the method of distributing cars in accordance with mine ratings. Upon the refusal of the Director General to accede to this representation, the matter was submitted to the President and considered by him in conference with the Director General and the United States Fuel Administrator.

As a result of this conference, an order was issued by the United States Railroad Administration, dated July 1, 1918, reciting that the assignment of cars for railway fuel had been discontinued effective June 24, 1918, on the Pennsylvania Railroad and the defendant's railroad, and their short-line connections, and ordering its discontinuance on all other lines in the Eastern, Allegheny and Pocahontas Regions; and on July 6, 1918, similar action was taken with reference to all other railroads under federal control. Previously to the issuance of these orders, and as a result of the same conference, the Fuel Administrator had issued a statement and order, reducing all maximum Gov-

ernment prices for bituminous coal ten cents per ton, and stating that this reduction was made possible by the reduction in the cost of production consequent upon the adoption of the plan of equal car supply to the mines. (Paragraph 7, Bill of Complaint, Pr. Rec., 11-17.)

The system of car distribution so established remained in force on all railroads under federal control until the passage of the Transportation Act and return of the railroads to private control on February 29, 1920, and was observed by the defendant after the termination of federal control and until April 15, 1920. (Pr. Rec., 17.)

For many weeks prior to and at the time of the filing of the bill there had been an acute shortage of cars for the transportation of coal on defendant's railroad (Pr. Rec., 9-10) and on or about April 15, 1920, the defendant commenced to assign to certain mines, not including plaintiff's mine, cars for transportation of railway fuel coal in excess of the number which such mines would have received if their mine ratings had been applied, and to distribute to plaintiff's mine fewer cars than its share according to its rating (Pr. Rec., 17, 10).

This method of distribution, which the bill charges to be in violation of said paragraph (12), Section 1 of the Interstate Commerce Act was effected pursuant to certain car distribution rules issued by defendant which are set forth in Exhibit A. (Pr. Rec., 10.)

These rules are as follows (Pr. Rec., 34):

> "8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio et al.* v. *H. V. R'y Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.
>
> 9. If the number of assigned cars placed at a

mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

The bill further alleges that the plaintiff is informed and believes that the shortage of coal cars will continue for a long period, that it has attempted to induce and persuade the defendant to discontinue the distribution of coal cars in the method above described, but the defendant has refused to abandon the practice and threatens and intends to continue it, and will do so unless restrained by the court.

The facts stated in the bill as to irreparable injury may be summarized as follows:

Bituminous coal tends to deteriorate when stored at the mines and is subject to serious danger of spontaneous combustion. At many mines it cannot be stored because of the contour of the land about the mouth of the mine. Hence bituminous coal mines cannot be operated unless cars are available in which to load and ship coal as and when it is mined. (Rec., 17-18.)

The maintenance of a bituminous coal mine in condition for operation involves a large overhead expense which accrues continuously whether the mine is in operation or not. This expense includes interest, taxes, insurance and depreciation, the salaries and wages of the sales organization, office employees, mine superintend-

ent, engineers and other necessary permanent employees, the expense of ventilating the mine and keeping it clear of water, and of feeding and caring for animals. The amount of this constant overhead cost which must be borne by each ton of coal mined necessarily increases as the tonnage mined decreases, and a reduction of car supply necessarily involves an increase in the unit cost of production. (Rec., 18.)

The reduction in the tonnage of coal produced also impairs the ability of the producer to fill contracts and supply customers and therefore tends to destroy the good will of his business and impair his credit. (Pr. Rec., 19.)

The principal incentive of mine laborers to continue in the employment of a particular mine is the regularity of the employment which it offers, and as between mines in the same or neighboring districts the best and most efficient labor will go to and remain at the mines with the smallest proportion of idle time. Mines with the greater proportion of idle time must therefore operate, when they can operate at all, with a depleted force of laborers of the least reliable and efficient grade. (Pr. Rec., 18-19.)

The plaintiff was entitled under its mine rating to 140.14 fifty-ton cars for the transportation of coal during May. Under the method of distribution used by defendant as set out in the bill it received only 108 cars. (Pr. Rec., 21.)

By reason of the general shortage of cars and the resulting shortage of bituminous coal, there had been during all of the period since April 15, 1920, a market for coal in which plaintiff could have sold at a profit all coal which its mine was capable of producing when running at its full capacity, and it was at all times ready, willing

and able to load all cars to which it was entitled under its rating with coal from its mine and could and would have disposed of such coal at a profit. (Pr. Rec., 20-21.)

Plaintiff is unable to store coal at its mine both because of the danger of spontaneous combustion and because of the contour of the land around its mine and is therefore compelled to cease mining coal when cars are not available, and during such periods it incurs all the overhead expenses above referred to. The result of the failure to supply plaintiff with its full share of cars during May was to increase the amount of this overhead chargeable to each ton of coal produced during that month by at least 19.5 cents. (Pr. Rec., 21.) In addition to this fixed overhead expense, the plaintiff was put to great expense in endeavoring to retain its employees and prevent the disruption of its working force, by giving its employees work not connected with the mining of coal from which it does not receive a pecuniary return commensurate with the expenditure. (Pr. Rec., 20.) The average cost of producing a ton of coal at plaintiff's mine in March, 1920, before the defendant resumed the practice of assigning cars for railway fuel coal was $2.36. The defendant commenced to assign cars for railway fuel on April 16, 1920, and in May the average cost of production at plaintiff's mine had risen to $3 per ton. (Pr. Rec., 21-22.)

While the plaintiff is suffering these injuries its competitors who receive assigned cars are relieved entirely or to a large extent even of the consequences of the general car shortage. They are enabled to operate their mines steadily, maintain their full productive capacity, keep the per ton cost of production down, build up and maintain the good will of their business, attract and keep labor of the best quality and thus to obtain a marked

competitive advantage over the plaintiff's mine and other mines served by the defendant which do not receive assigned cars. (Pr. Rec. 19.)

The bill further alleges that the plaintiff's only remedy at law is to bring successive suits for damages against defendant which would result in a multiplicity of suits and great and burdensome costs and expenses, and that a continuance of the unlawful practices of the defendant will result in partial or complete disruption of plaintiff's organization, and great and increasing injury to the property, good will and business of the plaintiff for which no adequate remedy at law exists, so that the plaintiff will continue to suffer such loss and injury unless the defendant is restrained by injunction. (Pr. Rec., 22.)

The bill prays that the defendant be restrained, during any period when the supply of cars for the transportation of coal on its line does not equal the requirements of the mines served by it, from distributing to any such mines more cars than they are entitled to on the basis of their respective ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine, and from distributing to plaintiff's mine a smaller number of cars than it is entitled to on the basis of its rating, and from enforcing its Rules 8, 9, and 10, which are set forth in full *supra*, or any other rules or practices having the same or a like effect; that it be directed to comply with the provision of paragraph (12), Section 1 of the act, and during any period of car shortage, to maintain and apply mine ratings to all mines served by it and to count each and every car furnished to or used by a mine for transportation of coal against that mine, and enjoined from following any rule or practice which will give to any mine served

by it cars for transportation of coal in a number, the ratio of which to the rated capacity of the mine is greater or less than the ratio of the total number of cars available on defendant's line for transportation of coal to the total rated capacity of all mines served by defendant. (Pr. Rec., 24-25.)

On the same day on which the bill was filed the defendant presented its petition and bond for removal to the United States District Court for the Northern District of West Virginia. The petition sufficiently alleged that the plaintiff was a citizen and resident of West Virginia and the defendant was a citizen and resident of Maryland, and also that the suit was one arising under the laws of the United States (Pr. Rec., 38-41), and a transcript of the record was thereafter filed and the case duly docketed in the United States District Court for the Northern District of West Virginia (Pr. Rec., 54). In that court the defendant filed its motion to dismiss and answer. (Pr. Rec., 84-93.)

The answer admits all of the allegations of the bill as to the establishment of mine ratings, the particular rating given to plaintiff's mine, the existence of a car shortage, and the rules of the defendant governing the distribution of cars in times of car shortage. (Pr. Rec., 85-87.)

It does not deny the allegations of the bill as to the preferential assignment of cars to mines shipping railway fuel, or as to the injurious effect of such distribution upon mines not receiving assigned cars. It does not deny the allegation that the rating of plaintiff's mine called for 140.14 cars during May and that the mine received only 108 cars, the allegations as to the increase in cost of producing coal at plaintiff's mine, or any of the allegations relating to the irreparable damage to plaintiff arising from the acts sought to be enjoined.

It admits that prior to federal control it was the defendant's practice to assign cars for railway fuel, and that such practice was abolished under federal control, but alleges upon information and belief that its abolition was not due to representations as to the disastrous effect of the practice upon the coal mining industry, but to the belief of the Fuel Administrator that he could better perform his duties if he had entire control of the distribution of coal. (Pr. Rec., 89, 90.)

It further alleges that the car distribution rules complained of by plaintiff were promulgated in pursuance of a notice to carriers and shippers issued on April 15, 1920, by the Interstate Commerce Commission, a copy of which notice is attached to the answer as "Exhibit B" and reads as follows (Pr. Rec., 105):

"INTERSTATE COMMERCE COMMISSION
WASHINGTON.

April 15, 1920.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that Rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the In-

terstate Commerce Commission in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act, as amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing Rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of Rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. MCGINTY,
Secretary."

The answer also alleges that the Commission's reasons for issuing this notice were stated in its reply to a resolution of the Senate, and the resolution and reply are attached to the answer as exhibits. (Pr. Rec., 94-104.) The resolution consisted of a preamble reciting that the railroads were assuming, under the Commission's notice of April 15, 1920, to make assignments of freight cars in a manner alleged to be prejudicial to the public welfare, and an inquiry as to the Commission's authority in the premises. The Commission's reply is in effect an argument in support of the proposition that the notice is a valid exercise of the Commission's authority and does not conflict with paragraph (12).

The motion to dismiss the bill filed with the answer alleged the following grounds (Rec., 84-85):

"1. That the bill does not state a case within the jurisdiction of the Circuit Court of Marion County or of this court.

2. That it does not appear in said bill that the matters complained of have been complained of to

the Interstate Commerce Commission or that said Commission has taken any action in respect thereof, and that the Circuit Court of Marion County has no jurisdiction in respect of the matters complained of in the bill and this court has no jurisdiction until the matters have been complained of to the Interstate Commerce Commission.

3. That the plaintiff has concealed the fact that the rules complained of are rules of the Interstate Commerce Commission, which fact was within the plaintiff's knowledge, and which fact is a most material and necessary fact for the proper determination of this case.

4. That this bill is a bill to restrain the enforcement, operation and execution of an order of the Interstate Commerce Commission, and United States of America and the Interstate Commerce Commission are necessary parties to this case.

5. That said bill is without equity."

When the cause came on for hearing in the District Court the defendant objected to the hearing of the motion for the injunction except by three judges, and moved that the sitting judge call to his assistance two other judges, of whom one should be a circuit judge, to hear said motion in accordance with the Act of Congress of October 22, 1913. The objection and motion were both overruled, and the hearing proceeded on the motion for a temporary injunction and the defendant's motion to dismiss. (Pr. Rec., 107.) In support of the motion for injunction, the plaintiff presented, in addition to the sworn bill of complaint, the affidavits of H. A. Garfield, former United States Fuel Administrator (Pr. Rec., 80-83), R. V. Norris and James H. Allport, former members of the Engineers' Committee of the United States Fuel Administration (Pr. Rec., 71-80), and of Samuel D. Brady (Pr. Rec., 55), Brooks Fleming, Jr. (Pr. Rec., 59), Claude M. Stebbins (Pr. Rec., 61), Cletus H. Jenkins (Pr. Rec., 64), and James M. Orr (Pr. Rec., 67).

Dr. Garfield's affidavit states the facts and circumstances attendant upon the prohibition of the use of assigned cars for railway fuel by the Railroad Administration, and the injury to the public resulting from the assigned car practice which led him to propose the taking of that step. The affidavits of Messrs. Allport and Norris state the results of an investigation made by the Engineers' Committee of the Fuel Administration into the increase in the cost of coal production caused by reduction in output. The remaining affidavits relate either to the concrete effects in the car shortage existing when the bill was filed, of the application of the defendant's car distribution rules which are complained of in this case, or to the consequences of the assigned car practice in general.

The ultimate facts which these affidavits tend to prove are alleged in the bill of complaint and have already been stated. As the bill itself was tendered and received as an affidavit in support of the application for the temporary injunction, and as no counter affidavits were filed and no controversy exists as to any material facts, it seems unnecessary to make further reference to these affidavits at this time.

The defendant based its motion to dismiss the bill and its opposition to the motion for a temporary injunction on the following grounds:

It contended (1) that the practice of assigning cars for railway fuel as complained of in the bill was not in conflict with paragraph (12), Section 1, of the Interstate Commerce Act; (2) that the method of distribution of cars for the transportation of coal was within the jurisdiction of the Interstate Commerce Commission and that no action would lie against a carrier in respect thereof unless complaint had first been made to the Commission

and it had passed on such complaint; (3) that defendant had been directed by the terms of the Notice to Carriers and Shippers issued by the Interstate Commerce Commission, and hereinabove set forth, to adopt the method of car distribution attacked by the bill, and that the making of this direction by the Commission was a lawful exercise of power conferred on it by paragraph (15), Section 1, of the Interstate Commerce Act, which reads as follows:

"(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority

in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may detemmine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded."

On June 29, 1920, the District Court overruled the defendant's motion to dismiss and granted a temporary injunction substantially in accordance with the prayer of the bill. (Pr. Rec., 107-109.) From this order the defendant appealed to the United States Circuit Court of Appeals for the Fourth Circuit.

On the argument of this appeal, Mr. Blackburn Esterline, representing the Attorney General, and Mr. P. J. Farrell, chief counsel for the Interstate Commerce Commission, appeared, and were heard as *amici curiae* in opposition to the temporary injunction from which the appeal was taken, and in support of the claim of defendant that the court should reverse the injunction and order the dismissal of the bill. (Pr. Rec., 123.)

The Court of Appeals handed down its opinion on August 11, 1920. (Pr. Rec., 123-130.) It held that paragraph (12), Section 1 of the Interstate Commerce Act required the distribution of coal cars in accordance with mine ratings during periods of coal car shortage, and that the method of distribution prescribed by the Commission in its order of April 15, 1920, and followed by the defendant did not conform to this requirement. But it also held that in the emergencies specified by paragraph (15), the Interstate Commerce Commission had authority under clause (d) of that paragraph to give directions inconsistent with the

car shortage provision of paragraph (12), and that the order of April 15, 1920, was a valid exercise of this authority, and it therefore entered the decree from which this appeal is prosecuted, reversing the temporary injunction, and remanding the cause to the District Court with directions to dissolve the injunction and dismiss the bill. (Pr. Rec., 131.)

On this record, the appellant contends:

1. That under paragraph (12), Section 1 of the Interstate Commerce Act, during any period when the supply of cars available for transportation of coal is not equal to the requirements of the mines served by a carrier, the carrier is bound to distribute the cars which are available in strict accordance with the respective ratings of the mines served by it.

2. That the Interstate Commerce Commission has no power or authority to relieve the carriers from the obligation to conform to this provision, or to sanction or prescribe any rule for the distribution of coal cars other than that prescribed by paragraph (12), and the notice dated April 15, 1920, does not justify the failure of defendant to conform to the requirement of paragraph (12).

3. That the violation by the defendant of the terms of paragraph (12) and the resulting injury to the plaintiff alleged in the plaintiff's bill, constituted a case within the equity jurisdiction of either a state or a federal court and the Court of Appeals erred in ordering the bill to be dismissed.

4. That the District Court was authorized to grant the temporary injunction which the Court of Appeals reversed, and the Court of Appeals erred in reversing said injunction.

Specification of Errors.

I.

The Circuit Court of Appeals erred in entering the decree dated the 12th day of August, 1920, in this cause.

II.

The Circuit Court of Appeals erred in reversing the temporary injunction awarded on June 30, 1920 by the United States District Court for the Northern District of West Virginia in said cause.

III.

The Circuit Court of Appeals erred in remanding said cause to the United States District Court for the Northern District of West Virginia, with directions to dissolve said injunction and dismiss the bill of complaint in said cause.

IV.

The Circuit Court of Appeals erred in ordering the dismissal of the bill of complaint in said cause.

V.

The Circuit Court of Appeals erred in holding that the notice of the Interstate Commerce Commission, dated April 15, 1920, set up in the answer of the defendant to the bill of complaint in said cause, was a valid exercise of a power vested by law in said Interstate Commerce Commission.

BRIEF.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PARAGRAPH (12), SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THE STRICT OBSERVANCE OF MINE RATINGS IN THE DISTRIBUTION OF CARS FOR THE TRANSPORTATION OF COAL DURING A PERIOD OF CAR SHORTAGE

Paragraph (12), Section 1, of the Interstate Commerce Act, provides that during any period when the supply of cars available for transportation of coal does not equal the requirements of the mines served by a carrier:

> "It shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense and the carrier, receiver or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense which may be recovered in a civil action brought by the United States."

We contend that the direction to apply mine ratings, coupled with the requirement that each and every car furnished to or used by a mine for transportation of coal shall be counted against that mine, is susceptible of but one meaning—that all cars delivered to coal mines during periods of car shortage are to be distributed among the mines in proportion to their respective rated capacities.

The Court of Appeals so held, and rejected the contention of defendant that paragraph (12) was merely declaratory of the rule established by the Commission in

Railroad Commission of Ohio v. *Hocking Valley Railway Company*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Company*, 13 I. C. C. 451, commonly referred to as the rule in the *Traer* case, and did not require the distribution of cars in accordance with mine ratings.

The holding of the Court of Appeals was correct for the following reasons:

First. The view that paragraph (12) did not change the rule in the *Traer* case cannot be maintained for the reason that the language of paragraph (12) is wholly irreconcilable with that rule.

The rule in the *Traer* case requires coal cars to be classified as assigned and unassigned cars and provides a different rule of distribution for each class. The language of paragraph (12) unmistakably establishes a uniform rule of distribution applicable alike to every mine and to each and every car furnished to or used by a mine for transportation of coal, and is therefore conclusive against the view that Congress intended to perpetuate the rule in the *Traer* case.

Sturges v. *Crowninshield*, 4 Wheat. 122.
United States v. *Goldenberg*, 168 U. S. 95.
Hamilton v. *Rathbone*, 175 U. S. 414.
Caminetti v. *United States*, 242 U. S. 470.
See Argument, *infra*, pp. 32-46.

Second. The assigned car practice was productive of gross evils both to coal operators who did not receive assigned cars and to the coal consuming public, and the legislative history of paragraph (12) demonstrates that it was enacted for the specific purpose of curing these evils by prohibiting the use of assigned cars which had been sanctioned by the rule in the *Traer* case.

See Argument, *infra*, pp. 46-62.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PARAGRAPH (15) CONFERRED AUTHORITY ON THE COMMISSION TO RELIEVE THE CARRIERS OF THE OBLIGATION TO CONFORM TO PARAGRAPH (12) OR TO PRESCRIBE A DIFFERENT RULE OF CAR DISTRIBUTION.

The decree of the Court of Appeals reversing the injunction and ordering the dismissal of the bill was based upon the view that the Commission was authorized by paragraph (15) to relieve the carriers of the obligation to conform to paragraph (12), and to prescribe a different rule, and that its notice of April 15, 1920, was a valid exercise of that power.

Paragraph (15) provides that when the Commission is of opinion that "shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country" it may, without complaint, notice or hearing:

(a) Suspend rules, regulations and practices with respect to car service.

(b) Give just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars and other vehicles.

(c) Require joint or common use of terminals.

(d) Give "directions for preference or priority of transportation, embargoes or movement of traffic under permits."

Defendant contended in the Court of Appeals that assuming paragraph (12) to require the ratable distribution of cars during a shortage, the Commission's notice was justified under clauses (a) and (b) of paragraph (15).

The Court of Appeals rejected this view but held that the notice was a valid "direction for preference or priority in transportation" under clause (d) of paragraph (15).

We contend that neither the contention of the defendant nor the view taken by the Court of Appeals can be maintained, for the following reasons:

First. The sole purpose of paragraph (15) is to enable the Commission to control the use by carriers of their equipment and facilities in the movement of freight, for the purpose of preventing or remedying car shortages and congestion of traffic, and the method of distributing cars among shippers during the existence of a shortage is wholly outside its scope and purpose.

Neal v. *Clark*, 95 U. S. 704.
Virginia v. *Tennessee*, 148 U. S. 503.
United States v. *Stever*, 222 U. S. 167.
United States v. *Salen*, 235 U. S. 237.
See Argument, *infra*, pp. 65-81.

Second. Even if paragraph (15) should be construed as conferring on the Commission authority over the distribution of cars among shippers, such authority does not extend to the making of directions or orders inconsistent with the express statutory requirement of paragraph (12).

United States v. *Symonds*, 120 U. S. 46.
Morrill v. *Jones*, 106 U. S. 466.
United States v. *United Verde Copper Company*, 196 U. S. 207.
Williamson v. *United States*, 207 U. S. 425.
United States v. *Grimaud*, 220 U. S. 506.
Railroad Commission of Nevada v. *Southern Pacific Company*, 21 I. C. C. 329, 341.
See Argument, *infra*, pp. 82-97.

Third. Paragraph (15) should not be construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12) or to give directions inconsistent with that provision, because, if it is so construed, it involves an invalid delegation of legislative power.

Field v. *Clark,* 143 U. S. 649.
Buttfield v. *Stranahan,* 192 U. S. 470.
Union Bridge Company v. *United States,* 204 U. S. 364.
McCullough v. *Virginia,* 172 U. S. 102, 112.
United States v. *Delaware & Hudson Railway Company,* 213 U. S. 366, 407.
See Argument, *infra,* pp. 97-103.

Fourth. The purpose and intent of Congress with reference to the transportation of coal evidenced by the enactment of paragraph (12), will be wholly defeated if paragraph (15) is construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12), or to give directions inconsistent with that provision.

See Argument, *infra,* pp. 103-106.

III.

THE PLAINTIFF IS ENTITLED TO RELIEF IN EQUITY EITHER IN A STATE OR FEDERAL COURT AGAINST THE CONTINUED VIOLATION BY APPELLEE OF THE CAR SHORTAGE PROVISION OF PARAGRAPH (12) AND THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE TEMPORARY INJUNCTION AND ORDERING THE DISMISSAL OF THE BILL.

1. The Circuit Court erred in ordering the dismissal of the plaintiff's bill.

It is well settled that one injured by reason of a car-

rier's violation of a provision of the Interstate Commerce Act may maintain an action based on such violation in either a state or a federal court, when the question of the carrier's liability does not require the determination of any question of reasonableness or unjust discrimination.

Pennsylvania Railroad Company v. *International Coal Company*, 230 U. S. 184.
Mitchell Coal & Coke Company v. *Pennsylvania Railroad Company*, 230 U. S. 247.
Pennsylvania Railroad Company v. *Puritan Coal Mining Company*, 237 U. S. 121.
Pennsylvania Railroad Company v. *Sonman Shaft Coal Company*, 242 U S. 120.

The case at bar is clearly within the rule established by these cases. The sole ground upon which the plaintiff claims the right to relief is that defendant has refused to apply mine ratings in the distribution of cars and to count each and every car against the mine to which it is furnished or which uses it, as required by paragraph (12). The determination of this claim obviously does not involve any question of reasonableness or discrimination.

If, as we contend, the Commission had no power or authority to relieve the carriers of their obligation to obey the car shortage provision of paragraph (12) or to prescribe a different method of distribution, the Commission's notice of April 15, 1920, could not affect the plaintiff's right to a distribution of cars in accordance with paragraph (12) or oust the jurisdiction of the courts to adjudicate that right.

See *Pennsylvania Railroad Company* v. *International Coal Company*, 230 U. S. 184, at page 197.

See Argument, *infra*, pp. 107-117.

2. The Court of Appeals erred in reversing the temporary injunction.

See Argument, *infra*, pp. 118-119.

IV.

THIS COURT HAS JURISDICTION OF THE APPEAL FROM THE DECREE OF THE CIRCUIT COURT OF APPEALS.

United States Fidelity and Guaranty Company v. *Bray*, 225 U. S. 205.

Louisville & Nashville Railroad Company v. *Cook Brewing Company*, 223 U. S. 70.

Spreckels Sugar Refining Company v. *McClain*, 192 U. S. 397.

Northern Pacific Company v. *Amato*, 144 U. S. 465.

See Argument, *infra*, pp. 120-122.

ARGUMENT.

The controversy in the case at bar involves the meaning and effect of paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act in connection with the distribution of coal cars during periods of car shortage. We are convinced, and shall maintain, that these statutory provisions speak plainly and unequivocally for themselves and that no historical investigation is necessary to their interpretation. Our opponents, however, have argued this case in the lower courts upon the theory that the statute is merely declaratory of pre-existing practices and rules, and will doubtless do so in this court, and as our discussion of the position they have taken will require frequent references to earlier phases of the problem, we have thought it advisable to preface our argument by a brief statement of the various stages through which coal car distribution has passed, as shown by reported decisions and by the record in this case.

Prior to 1907, the distribution of coal cars during periods of car shortage was regulated by the carriers themselves, and the general practice was to divide cars for the transportation of coal into two classes, one consisting of so-called privately owned cars and cars for the transportation of locomotive fuel, called assigned cars, and the other consisting of all other available cars and called unassigned cars. All coal mines were rated according to productive capacity, and during car shortages unassigned cars were distributed among the mines in proportion to their respective ratings. Assigned cars on the other hand were delivered to the mines to which they were consigned without regard to ratings and the mines receiving assigned cars were allowed their full *pro rata* shares of unassigned cars in addition.

Complaints were made to the Commission that this practice resulted in undue preferences contrary to the prohibitions of Section 3 of the Interstate Commerce Act. In two cases—*Railroad Commission of Ohio* v. *Hocking Valley Railway Company*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Company*, 13 I. C. C. 451, the Commission sustained these complaints, and prescribed a new rule.

This rule did not change the classification of cars, nor did it place any limitation on the number of assigned cars which might be delivered to a mine. In fact the Commission expressly held that all assigned cars must be delivered to the mine to which they were consigned. The sole change made by the Commission in the existing practice was to prohibit mines receiving assigned cars from sharing the unassigned cars ratably with the mines which received no assigned cars. In other words, under the Commission's ruling a mine receiving assigned cars equaling or exceeding in number the cars it would have received if all cars had been distributed according to mine ratings could receive no unassigned cars. If the assigned cars received by a mine were fewer in number than its rating called for, it was entitled to unassigned cars sufficient to make up that number.

The rule thus established is sometimes referred to as if it required assigned cars to be counted both as a part of the stock available for distribution, and also against the distributive shares of the mines receiving them. This is inaccurate and misleading. In applying the rule, both assigned and unassigned cars were provisionally pooled, and the distributive shares of the mines were tentatively ascertained as if all mines were to share in the pool according to their respective ratings. The assigned cars consigned to each mine which was to receive assigned cars were then counted and in any case in which

the number so consigned to a mine equaled or exceeded the distributive share tentatively ascertained for that mine, that mine, and the cars consigned to it were eliminated from consideration in the general distribution, and the remaining cars were distributed among the remaining mines in accordance with the ratings of such mines.

It will be observed that the rule involved two countings. All assigned cars were included in the first count, but that was made for the sole purpose of determining what mines and how many assigned cars should be eliminated from the *pro rata* distribution. The second counting included only the cars not eliminated as a result of the first counting, and was made for the purpose of insuring the receipt by each mine included in the general distribution of its ratable share and no more. To say that these cars were counted against the distributive share of the mines receiving them is to use an expression easily understood, and entirely appropriate to the procedure of a ratable distribution. Under the Commission's rule some assigned cars might be included in this count, since, if the assigned cars consigned to a mine were fewer in number than its distributive share, such cars were included in the *pro rata* distribution, but the general statement that under the Commission's rule assigned cars were counted against the distributive share of the mine inevitably suggests that the cars which were eliminated as a result of the first count were also ratably distributed and cannot fail to cause confusion.

This rule, commonly known as the rule in the *Traer* case, remained unchanged until about six months after the railroads passed into the control of the Government, when the United States Fuel Administrator made representations to the

Railroad Administration and ultimately to the President that the preference in car supply which it afforded to mines supplying locomotive fuel was productive of serious injury to the public interest because of its effect upon the production of coal and the price paid for it by the general public. The result of the Fuel Administrator's action was that in June and July, 1918, new rules were put in force by the Railroad Administration on all railroads serving coal mines. These rules eliminated railway fuel cars from the class of assigned cars, and thereafter and until the termination of federal control, railway fuel mines were allowed no preference in the matter of car supply.

While the termination of federal control was under consideration in Congress the matter of coal car distribution was brought to the attention of that body, with the result that paragraph (12) was incorporated in Section 1 of the Interstate Commerce Act by Section 402 of the Transportation Act. The Transportation Act became effective February 28, 1920. On March 2, 1920, the Interstate Commerce Commission issued a recommendation to the carriers that the coal car distribution rules of the Railroad Administration be retained until experience should demonstrate that other rules would be more effective. On April 15, 1920, it issued the notice relied on by the defendant in this case directing the railroads to substitute for the Railroad Administration rules, the assigned car practice sanctioned by the *Hocking Valley* and *Traer* cases, and it was the action of the defendant claimed to be pursuant to this notice which brought about the institution of the present suit.

I.

PARAGRAPH (12), SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THE STRICT OBSERVANCE OF MINE RATINGS IN THE DISTRIBUTION OF CARS FOR THE TRANSPORTATION OF COAL DURING A PERIOD OF CAR SHORTAGE, AND THE METHOD OF DISTRIBUTING CARS ADOPTED BY THE DEFENDANT, KNOWN AS THE ASSIGNED CAR PRACTICE, IS A VIOLATION OF THIS STATUTORY PROVISION.

Paragraph (12), Section 1 of the Interstate Commerce Act provides that during any period when the supply of cars available for the transportation of coal does not equal the requirements of the mines served by a carrier:

> "It shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

There is but one word in this provision which can possibly call for explanation, and as to the meaning of that word there is no controversy in this case. The "rating" of a bituminous coal mine is its daily productive capacity ascertained and announced by the carrier and ordinarily expressed in terms of fifty-ton cars. A carrier makes ratings of the mines served by it for the sole purpose of enabling it to prorate the available cars among such mines during periods of car shortage. At the time of the adoption of paragraph (12) and for many years prior thereto, such mine ratings had been an essential part of the system of car distribution of every common carrier by railroad which served bituminous coal mines.

When this is understood, the provision above quoted requires no further interpretation. The direction to apply mine ratings, coupled with the requirement that each and every car used by or furnished to a mine for transportation of coal shall be counted against that mine, is susceptible of but one meaning—that all cars delivered to coal mines during car-shortage periods are to be distributed among the mines in proportion to their respective rated capacities. The legislative intention to enforce this strict observance of mine ratings could not have been more plainly and forcibly expressed.

This view of the meaning of paragraph (12) was accepted in the instant case not only by the District Court but by the Court of Appeals. If it is correct, the practice followed by defendant and authorized by its car distribution rules, of disregarding mine ratings in the distribution of assigned cars obviously does not conform to the statute. There is no controversy as to this point. The Court of Appeals expressly so held, and based its decision that the bill should be dismissed solely on the theory that the Interstate Commerce Commission had authority under paragraph (15) of Section 1 to prescribe a different method of car distribution from that prescribed by paragraph (12) and that its notice of April 15, 1920, was a valid exercise of this authority. The defendant, however, while it admits that its practice does not conform to this construction of paragraph (12), questions the construction, and contended in the Court of Appeals that paragraph (12) did not require the application of mine ratings in the distribution of assigned cars, and that its practice in that regard was not in conflict with the statute.

This contention acquires its principal claim to consideration from the fact that it is based upon an official statement by the Interstate Commerce Commission which

was attached to the defendant's answer to the bill of complaint and is therefore a part of the record in this case. (Pr. Rec., 94-104.) This statement was made by the Commission in reply to a resolution of the Senate inquiring by what authority the Commission had issued its order of April 15, 1920. It reviews at some length the history of the assigned car practice, and the establishment of the rule in the *Traer* case, and refers to the case of *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, in which this court held that the establishment of that rule was within the jurisdiction of the Commission. It also suggests that the abandonment of the use of assigned cars for railway fuel during federal control was followed by confiscations of coal by the railroads, and states that no definite rule or practical plan to keep the railroads supplied with fuel except by the use of assigned cars has ever been suggested by any of the parties in interest; and it states its conclusion as to the effect of paragraph (12) as follows (Pr. Rec., 103):

> "The Commission is of opinion that paragraph (12) of Section 1 of the Interstate Commerce Act does not change the rule of law laid down in the *Hocking Valley* and *Traer* cases, *supra*. The paragraph states in statutory form that which had heretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States."

As to this proposition we say:

First. The view of the Commission that paragraph (12) did not change the rule in the *Traer* case cannot be maintained for the reason that the language of paragraph (12) is wholly irreconcilable with that rule.

Second. The purpose and intent of Congress in enacting paragraph (12), as shown by the situation existing at the time of its adoption and by its legislative history,

was not, as the Commission suggests, to state the rule in the *Traer* case in statutory form, but on the contrary to prohibit the use of assigned cars as sanctioned by that rule.

1. The view of the Commission that paragraph (12) did not change the rule in the Traer case cannot be sustained, for the reason that the language of paragraph (12) is absolutely irreconcilable with that rule.

The reply made by the Commission to the Senate resolution does not discuss the language of paragraph (12), but attempts have been made to reconcile that language with the Commission's view that it does not change the rule in the *Traer* case, by counsel for defendant, and also by the United States District Court for the Northern District of Alabama in the case of *Corona Coal Company* v. *Southern Railway Company*, 266 Fed. 726, in which an injunction against the assigned car practice was denied.

The theory of defendant's counsel was stated in their brief in the Court of Appeals as follows (page 12):

> "In providing in Section 1, paragraph (12) that the carrier should
>
> 'Count each and every car furnished to or used by any such mine for transportation of coal against the mine'
>
> Congress merely put in statutory form that which the Commission and the United States Supreme Court had judicially determined to be the law.* Prior to 1907 assigned cars were not counted. Any mine receiving them was given, in addition, its full percentage of system or unassigned cars.

*It is misleading to say that the Commission and the United States Supreme Court had "judicially determined" the rule in the *Traer* case to be the law. The Commission does not make judicial determinations, and all that this Court has ever determined with regard to the rule in the *Traer* case was that the Commission was authorized to prescribe it. *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452. The rule has never been anything but a car distribution rule prescribed for the carriers by an administrative decision of the Commission.

> From the following quotations it will be seen that 'count' in connection with car service has acquired a distinct technical meaning, under which cars accounted for under Rules 8, 9 and 10, have been recognized for years as 'counted.' "

It will be observed that this statement makes no reference to that part of paragraph (12) which precedes the provision which it quotes. Paragraph (12) does not merely require the counting of cars. It directs the carriers "to maintain and apply just and reasonable mine ratings *and* to count each and every car," etc. Obviously the counting requirement must be construed so as to harmonize with the direction to maintain and apply mine ratings, and it is one of the conclusive objections to counsel's position on this point that if the language of the counting requirement is construed as they suggest, it squarely contradicts the direction to apply mine ratings.

Rules 8, 9 and 10, which, according to counsel, embody the system of accounting for cars prescribed by the counting requirement of paragraph (12) are set forth in the record. (Pr. Rec., 24.) Rule 8 defines the terms "assigned cars" and "unassigned cars." Rule 9 reads as follows:

> "9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, *equals or exceeds the mine's pro rata share of the available car supply*, it shall not be entitled to any unassigned cars. *The assigned cars, together with the mine's requirements, will be eliminated*, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination."

Rule 10 provides that if the assigned cars delivered to a mine are less than its *pro rata* share, based on a revised percentage, it shall be entitled to enough unassigned cars to make up its *pro rata* share.

In other words, where the assigned cars delivered to a mine exceed its *pro rata* share, that mine is eliminated from the *pro rata* distribution. Its rating is not applied —it is ignored. And while the remaining cars are distributed to the other mines in accordance with their ratings, those ratings are not applied in the sense required by the mandate of the statute. There is no possible ground for holding that the direction to apply mine ratings was made with reference to anything less than "the supply of cars available for such service," *i. e.*, the transportation of coal, previously mentioned in paragraph (12), and when one mine receives more than its *pro rata* share of that supply, all the other mines necessarily receive less than their shares, and none of the ratings is applied.

It is not claimed by counsel that the language used by Congress in regard to the application of mine ratings has acquired any distinct technical meaning in connection with the rule of the *Traer* case, and there is no color for such a claim. The Commission, in the decisions which established the rule in the *Traer* case, did not discuss the subject in terms of the application of mine ratings. This was quite natural for the reason that these decisions were all concerned with the definition of the conditions under which the rating should be ignored. The language in which the unequivocal direction of paragraph (12) that mine ratings shall be applied was couched had, therefore, not only never been associated with the rule in the *Traer* case, but plainly and unmistakably described a procedure wholly inconsistent with that rule.

Hence if the construction suggested by counsel is placed upon the counting requirement of paragraph (12), we have in the same sentence a peremptory mandate to apply mine ratings followed by an equally peremptory command to disregard them. Manifestly the court will

not attribute a technical meaning to the word "count" when the result would be the utter stultification of Congress.

On the other hand, if the car shortage provision is read as a whole and the language is given its ordinary and natural significance, it is clear, consistent and self-explanatory. No one not obsessed with a preconception as to the legislative intent derived from sources other than the language of the statute, could doubt for a moment that the legislative purpose was to enforce the observance of mine ratings and that the requirement for the counting of cars was imposed to further that purpose. The language of that requirement expresses with perfect appropriateness and accuracy, an intention that cars shall be counted against the mines to the end that each mine shall receive the number of cars called for by its rating, and no more, and in the connection in which it was used by Congress we insist that no other construction can be given to it.

This view was clearly and forcibly expressed by the Court of Appeals. The court said (Pr. Rec., 128):

> "The count of each and every car required is not a mere independent futile enumeration; but a count of each and every car furnished or used against the mine *to the end that there should be proportional distribution of all available coal cars resulting in fair and equal opportunity to each mine on the basis of its rating.* Before the enactment of the statute the matter had been controlled by rules, regulations and practices made by railroads or the government railroad administration which had been the subject of much controversy. Evidently the Congress having in view this controversy after full consideration settled the matter *by an imperative enactment against the assigned car rule* in times of ordinary coal car shortage. Thus it appears to us the rules of the Interstate Commerce Commission above set out are not in accord with subdivision 12 of the Transportation Act of 1920, standing alone."

We do not, however, wish to be understood as admitting that the counting requirement of paragraph (12), standing alone, could be construed as embodying the method of accounting for cars required under the rule in the *Traer* case. The conclusive answer to any and every argument that can be advanced in favor of such a construction is that the rule in the *Traer* case recognized two methods of accounting for cars, one applicable to assigned cars, and another, totally different, applicable to unassigned cars, whereas paragraph (12) unmistakably prescribes a single method of counting applicable alike to each and every car used for transportation of coal.

The claim made by counsel in the Court of Appeals that the word "count" had acquired a technical meaning in connection with the rule in the *Traer* case and that this meaning should be given to it in the statute entirely ignores this proposition. Their argument was that the Commission had stated in various opinions, from which they quoted, that the rule in the *Traer* case required all assigned cars to be counted against the distributive shares of the mines receiving them, that the word "count" had thus acquired a technical meaning descriptive of the method of accounting for cars sanctioned by the Commission, and that Congress must be taken to have used the word in this technical sense.

But even if it can be said that the word "count" was used in a technical sense in the cases to which counsel refer, it cannot possibly be claimed that it had that technical significance except when it was used in connection with the counting of assigned cars. Long before the rule in the *Traer* case was ever thought of, unassigned cars were counted against the distributive shares of the mines receiving them in the ordinary straightforward sense of that expression—that is to say each unassigned car was charged against the distributive share of the mine re-

ceiving it for the purpose of insuring a *pro rata* distribution, and unassigned cars continued to be so counted for that purpose after the rule in the *Traer* case was established, and until the enactment of paragraph (12). There was, therefore, never either occasion or excuse for giving any specialized meaning to the word "count" in connection with unassigned cars, and in the passages from the opinions of the Commission referred to by counsel, the Commission was not discussing the distribution of unassigned cars but was concerned exclusively with the special rule it had established with regard to assigned cars.

We do not think it can be said that even in this limited connection, the Commission used the word "count" in a technical sense. It is true, as counsel pointed out in the Court of Appeals, that the Commission frequently said that all assigned cars must be counted against the distributive shares of the mines receiving them. But it is also plain that the Commission recognized that this statement standing alone and unqualified would convey the impression that assigned cars were subject to *pro rata* distribution in the same manner as unassigned cars, since it always took pains to make clear that assigned cars must be delivered to the mine to which they were consigned even though the number so consigned exceeded that mine's distributive share. This requirement is sometimes coupled directly with the counting requirement, the one being stated as a qualification of the other, and sometimes separated from it, but it is always expressly stated in the Commission's opinions as to the assigned car rule. We think an examination of the cases, which we cite in the margin,* indicates that what the Commission

**Rail & River Coal Company* v. *Baltimore & Ohio Railroad Company*, 14 I. C. C. 86.
Hillsdale Coal & Coke Company v. *Pennsylvania Railroad Company*, 19 I. C. C. 356.

had in mind could be more accurately described as a rule that all assigned cars must be counted against the distributive shares of the mines receiving them, subject to a proviso or exception to the effect that all assigned cars must be delivered as consigned, rather than any special or technical meaning of the word "count."

In any event it is clear that the inference as to the construction of the counting requirement of paragraph (12) which counsel seek to base upon these cases is not justified. In fact if they could be said to have any real bearing on the interpretation of paragraph (12) the only inference that could be drawn from them would be, that since Congress had omitted to qualify the requirement imposed by that paragraph that all cars must be counted against the mines, by the proviso, always explicitly insisted upon by the Commission in these cases, that all assigned cars must be delivered according to consignment, Congress intended the counting requirement to be enforced without any such qualification.

But the fundamental objection to counsel's argument on this point is that these cases have no bearing whatever on the interpretation of paragraph (12). That paragraph ignores any division of coal cars into classes and prescribes as plainly as the resources of language permit a uniform rule applicable to each and every such car. What the Commission may have said in discussing a special and exceptional rule which was dependent upon a division of coal cars into classes, and which was applied only to one of those classes, obviously cannot be resorted to as an aid in the construction of this provision.

The theory upon which the learned district judge who decided *Corona Coal Company* v. *Southern Railway Company*, cited *supra*, attempts to maintain the proposition that paragraph (12) does not conflict with the rule in the

Traer case is stated in the opinion in that case as follows (p. 731):

> "An examination of the Transportation Act shows that Congress has not declared, in paragraph 12 or elsewhere, that in a case like the one now here the *pro rata* plan of distribution shall be applied to assigned cars according to mine ratings as in the case of ordinary commercial cars; but the statute says no more than such 'assigned cars shall be counted against the mine receiving them.'"

As to this interpretation of paragraph (12), we say:

Even if the assumption of the court that the counting requirement is not connected with the direction to apply mine ratings is accepted, it is difficult to understand upon what theory the learned judge excluded assigned cars from the operation of the latter provision. It is true that assigned cars are not expressly mentioned. Neither are unassigned cars. The "supply of cars available for such service" is the subject matter of the provision, and "such service" is of course the transportation of coal referred to in the preceding sentence. Obviously a car cannot become an assigned car unless it is available for transportation of coal, and any car available for transportation of coal is within the direction to apply mine ratings.

It is, however, quite impossible to divorce the counting requirement from the direction to apply mine ratings. Congress did not, as the court seems to assume, direct that each and every car used or furnished for transportation of coal should be counted against the mine receiving it, and provide a penalty of one hundred dollars for every car not so counted, for the mere satisfaction of knowing that a highly correct and wholly futile census of coal cars would be taken each day. If the counting of cars required by the statute was not intended as a part of the procedure of applying mine ratings in the distribution

of such cars, the fact that the statute required it must be regarded as the result of an inexplicable aberration on the part of Congress, and if it was so intended then it amounts to an emphatic declaration that each and every car furnished or used for transportation of coal is subject to distribution in accordance with mine ratings.

The theories of counsel for defendant and of the court in the *Corona Coal Company* case have one point in common. They are based on the assumption that Congress intended to perpetuate the division of cars for transportation of coal into two classes, and the application of a different rule of distribution to each class, and inspired by a determination to read this intention into the statute at whatever cost of violence to its language.

That the courts will not lend themselves to this method of dealing with statutes is well settled. No rule of statutory construction is more fundamental than that which requires the legislative intention to be ascertained primarily from the language which the legislature has used. If that is clear and unambiguous, and its practical application involves no absurd or grossly unreasonable consequences, the inquiry is at an end and the sole duty of the court is to enforce the statute according to its terms.

This doctrine has been consistently adhered to, and frequently applied by this court.

A leading case on the subject is *Sturges* v. *Crowninshield*, 4 Wheat. 122, in which Chief Justice Marshall stated the rule as follows (pages 202-203):

> "* * * although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where

> the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words, is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

In *United States* v. *Goldenberg*, 168 U. S. 95, the court said (pages 102-103):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense; *Holy Trinity Church* v. *United States*, 143 U. S. 457; it involves no injustice, oppression or absurdity, *United States* v. *Kirby*, 7 Wall. 482; *McKee* v. *United States*, 164 U. S. 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other."

In *Hamilton* v. *Rathbone*, 175 U. S. 414, the court again laid down the same rule. Mr. Justice Brown, who delivered the opinion, said (page 419):

> "The general rule is perfectly well settled that,

where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Heydon's* case, 3 Fed. Rep. 76; *United States* v. *Freeman,* 3 How. 556; *Smythe* v. *Fiske,* 23 Wall. 374; *Platt* v. *Union Pacific Railroad Co.* 99 U. S. 48; *Thornley* v. *United States,* 113 U. S. 310; *Viterbo* v. *Friedlander,* 120 U. S. 707, 724; *Lake County* v. *Rollins,* 130 U. S. 662; *United States* v. *Goldenberg,* 168 U. S. 95."

The recent case of *Caminetti* v. *United States,* 242 U. S. 470, strikingly illustrates the doctrine. In this case the statute under consideration was the so-called White Slave Traffic Act of June 25, 1910. The statute made it an offense to transport in interstate commerce any woman for the purpose of prostitution or "for any other immoral purpose."

The plaintiff in error sought a reversal of his conviction under the act on the ground that the transportation in which he had engaged was not shown to have been for gain. The title of the act, and its legislative history gave support to the view that it was directed at commercialized vice, and that an immoral purpose which had no commercial element in it was not within the purview of Congress when it enacted the statute.

In affirming the conviction the court stated the general rule as follows (page 485):

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of

the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Lexington Mill and Elevator Co.* 232 U. S. 399, 409; *United States* v. *Bank*, 234 U. S. 245, 258.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. *Hamilton* v. *Rathbone*, 175 U. S. 414, 421."

Commenting on the contention that the title of the act and the committee report which accompanied the introduction of the bill into the House of Representatives, showed that the evil aimed at was interstate and international traffic in women, the court said (page 490):

"Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. *Blake* v. *National Banks*, 23 Wall. 307, 319; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 42; *Chesapeake and Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 246; *Binns* v. *United States*, 194 U. S. 486, 495. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308."

The application of the doctrine of these cases in the case of paragraph (12) is plain. The language of the car shortage provision states succinctly and with perfect clearness a single rule of *pro rata* car distribution

applicable alike to all coal cars and to all coal mines. It does not even remotely suggest an intention on the part of Congress that coal cars should be divided into two classes and a different rule of distribution established for each class. The sole inspiration for the claim that any such intention existed is derived from the fact that the Commission had in the past recognized and sanctioned such a distinction. But a question of construction cannot be raised upon such a pretext. A court may enter upon a historical investigation to resolve a doubt as to the meaning of a statute, but the cases cited conclusively establish the principle that the propriety of such an investigation depends upon the existence of a doubt *originating in the language of the statute.* In *Hamilton* v. *Rathbone,* 175 U. S. 414, cited, *supra,* the court said (page 421):

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve,* but not to *create* an ambiguity. If Section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation."

So, in the case of paragraph (12), it is only by reference to the prior decisions of the Interstate Commerce Commission that any color is given to the hypothesis of an intention on the part of Congress to recognize the rule in the *Traer* case. The language which Congress used not only fails to suggest this hypothesis, but unequivocally repels it.

That considerations within the cognizance of Congress when the proposal to legislate as to coal car distribu-

tion was pending amply warranted the view that the public interest required the abolition of the assigned car practice and the establishment of the principle of *pro rata* distribution, and that paragraph (12) was in fact enacted for the express purpose of accomplishing these ends, we shall presently undertake to show. We insist, however, that independently of all extrinsic considerations, paragraph (12) on its face conclusively establishes that such was the legislative intent, and that the court's sole function in the premises is to enforce it according to its terms.

2. The purpose and intent of Congress in enacting paragraph (12), as shown by the situation existing at the time of its adoption, and by its legislative history, was not, as the Commission suggests, to state the rule in the Traer case in statutory form, but, on the contrary, to prohibit the use of assigned cars sanctioned by that rule, and establish the principle of pro rata car distribution.

The contention that paragraph (12) was not intended to disturb the rule in the *Traer* case is based upon the assumption that that rule is so strongly fortified by the approval of the Interstate Commerce Commission, by years of usage, and by every consideration of expediency, that any intention on the part of Congress to do away with it is almost inconceivable. This was the attitude of the chief counsel for the Interstate Commerce Commission and the representative of the Attorney General who appeared as *amici curiae* in the Court of Appeals, and it is clearly reflected in the reply made by the Interstate Commerce Commission to the Senate resolution which appears in the record.

That reply does not discuss the language of paragraph (12). It is concerned chiefly with the history of the assigned car practice, indicates plainly the Com-

mission's view that the limitation put upon that practice by the decisions in the *Hocking Valley* and *Traer* cases was as drastic as practical considerations either required or permitted, and takes it for granted that Congress did not intend to disturb the status of assigned cars as fixed by those decisions.

In the last preceding subdivision of this argument we pointed out that the clear and unambiguous language of paragraph (12) was an insuperable obstacle to the adoption of this view. But we do not feel called upon to leave unchallenged the position strenuously maintained not only on the part of the defendant but by the Interstate Commerce Commission, and the Department of Justice, that paragraph (12) as we insist it must be construed, is a grossly improvident exercise of legislative power.

The injurious results of the assigned car practice to operators who do not receive assigned cars, in loss of profits due to the curtailment of output, loss of good will, injury to credit, reduction in plant efficiency, and inability to compete on equal terms with operators who receive assigned cars, are set forth in the bill and affidavits in this case, and no attempt has been made to controvert this evidence.

The gross incongruity of this tolerated and encouraged preference and discrimination, producing serious and substantial damage to a large class of shippers, in a system of regulation which was primarily intended to prevent discrimination and preferences by carriers in interstate commerce, is obvious, and we believe that the immediate consequences of the assigned car practice to the plaintiff and other shippers of coal similarly situated amply warranted the intervention of Congress.

We shall not dwell upon this point, however, for the

reason that the private losses suffered by coal operators may well be deemed relatively unimportant in the determination of legislative policy toward coal car distribution, in comparison with the injury which the assigned car practice inflicts upon the public.

A serious coal car shortage affects the public directly in two ways—it reduces the current supply of coal till it is insufficient to meet the current demand, and it increases the cost of such coal as is available. The peculiar vice of the assigned car practice is that it enables the consumers who benefit by it, to escape both of these consequences by shifting their legitimate share of the burden of the shortage to other consumers.

The railroads consume approximately one-third of the bituminous coal produced in the United States. Their requirements are, of course, at the peak during the winter months, when car shortages are most likely to occur. Under the rule in the *Traer* case they are protected against any failure in their coal supply on account of a car shortage, since that rule permits them to give to railroad fuel mines a full car supply no matter how acute the general shortage may be. The extent to which the carriers may monopolize the available cars through which the needs of industrial and domestic consumers must be supplied if they are to be supplied at all, is limited only by the carriers' opinion of their own requirements. The result may be and frequently is, that mines not shipping railroad fuel are for all practical purposes shut down for lack of cars at the very time when the needs of their customers are most pressing.

The affidavits in support of the motion for a temporary injunction afford interesting illustrations of this result of the assigned car practice.

The affidavit of the chief clerk of the Northern West

Virginia Coal Operators' Association (Pr. Rec., 62) shows that in June, 1920, the total rated capacity of the 69 mines served by defendant within the district subject to the jurisdiction of its agent at Grafton was approximately 1,559 cars; that on June 12th of that year 744 cars were available for transportation of coal in that district, or about 47 per cent of this total rated capacity, but only 170 cars, or about 11 per cent, were available for commercial shipments, the balance having been distributed as assigned cars.

The affidavit of James M. Orr (Pr. Rec., 67) shows that the Hudson Coal Company, of which he is president, operates four mines served by the defendant. The greater portion of the output of two of these mines was under contract for delivery to various railroads. The other two mines had no railroad fuel contracts. The defendant began to assign cars to the two mines first mentioned early in May, 1920, for loading the railway fuel which the coal company had contracted to deliver, and continued so to assign cars on practically every working day up to June 15th, the date on which the affidavit was sworn to, although the contracts under which this coal was sold made no provision for a preferred car supply. During the same period the other two mines of the affiant had between them but three days on which they could work full time, and their average car supply was about 38 per cent of their requirements. These mines are in the same neighborhood as the mines of the Long Coal Mining Company, which sells its entire output for locomotive fuel, and the mines of that company not only worked full time on practically every working day after the practice of assigning cars for railway fuel was resumed and until the date of the affidavit, but as a rule had empty cars standing at their tipples after the day's work was completed.

The affidavit of Samuel D. Brady (Pr. Rec., 55), president of the Osage Coal Company, operating mines on the Morgantown & Wheeling Railway, states that on that railroad there was an acute shortage of cars from about the middle of January, 1920; that during thirty days prior to April 10, 1920, the mines of the Osage Company received about 41 per cent of their normal car requirements, and other mines which were loading railway fuel and were even then receiving assigned cars, although the Commission's order of April 15, 1920, had not been promulgated, received from 45 per cent to 66 per cent of their normal requirement. During the succeeding thirty days—the Commission's order having been issued in the first week of the period,—the supply of cars received by the Osage mines dropped to 12.24 per cent, while the railway fuel mines received from 29 per cent to 73 per cent.

Obviously it would be the part of wisdom for all consumers to protect themselves against the recurring seasonal shortages of cars by acquiring reserve stocks during the summer months and consumers failing to do so must expect to suffer the consequences of their own neglect. So far as we are advised, however, no reason has ever been given for permitting the railroads which have omitted that obvious precaution to make the private consumer bear the consequences of their negligence as well as his own.

The responsibility for furnishing equipment to move coal rests upon the railroads. They have been permitted to escape liability for the annual coal car shortage on the plea that they cannot reasonably be expected to meet the peak demand since it would involve providing equipment which would be idle the rest of the year. What seems to have been generally ignored is that the railroads themselves, as consumers, share with the other

consumers the responsibility for the seasonal fluctuation in the demand for coal. If the railroads were in the habit of acquiring reserve stocks of locomotive fuel during the spring and summer which would provide for a substantial part of their requirements for the winter, the largest single factor in the production of the annual car shortage would be eliminated.

But so long as the railroads are permitted to use assigned cars in the manner approved by the Commission, they will not take this reasonable precaution. They will continue under that license to intensify the annual car shortage by depending upon a current supply of coal for their winter needs, and they will extricate themselves from the predicament which this improvidence has largely contributed to cause by taking advantage of the rule in the *Traer* case to monopolize the available cars to the prejudice of other consumers.

Regardless of any question of the private interest of the coal operators this consideration alone furnishes a complete justification for legislation against the assigned car practice.

But the advantage which the use of assigned cars gives to the railroads at the expense of other consumers is not confined to an unwarrantable preference in the matter of fuel supply. It also enables them to shift a large financial burden to the private consumers who are compelled to depend on mines which do not receive assigned cars.

It is a fact of common knowledge that bituminous coal mines operate only when cars are available in which to load the coal as it comes from the mines, and a reduction in car supply therefore involves a corresponding reduction in output, together with an increase in the fixed overhead expense chargeable to each ton of coal pro-

duced. Hence the coal mined during a period of car shortage necessarily costs more to produce than an equivalent tonnage produced during a period when the car supply is equal to the normal requirements of the mines. But with the rule in the *Traer* case in force there is no reason why the carrier should bear any part of the burden of this increased cost. Under that rule, the railroad may guarantee a full car supply to any mine whose output it has purchased, regardless of any general shortage, however acute, and if with that guaranty it does not obtain locomotive fuel at prices based on normal production costs, its purchasing agent should be removed for incompetency.

Of course the saving thus made in the cost of production of railway fuel involves an increase in the production costs at mines not favored with assigned cars, whose car supply is reduced below their ratable proportion of the available supply by reason of the preference given to railway fuel mines. The extent to which the burden of the private consumer may be thus increased is indicated by the affidavits of Messrs. Allport and Norris (Pr. Rec., 71-80), who, as engineers of the Fuel Administration, conducted an investigation into the effect of reduced output on cost of production, the results of which are set forth in their affidavits. This investigation was based on the cost reports made to the Federal Trade Commission during 1917 by 73 operations in the New River district of West Virginia. It has been checked by a similar analysis of the costs of nineteen anthracite mines and of a single colliery in Pennsylvania over a period of four years, and in the opinion of Messrs. Allport and Norris is substantially accurate for the whole industry.

These affidavits show that the cost of production increases at a rate in excess of the diminution

of output. If the car supply is 50 per cent below normal an average increase in unit production cost of 41 per cent above normal may be expected. If, however, the withdrawal of assigned cars from the general stock reduces the supply of mines not receiving assigned cars to 25 per cent of their requirements, the cost of production at those mines will be increased by an additional 45 per cent.

It appears from the affidavit of Dr. Garfield (Pr. Rec., 80-83) that this effect of the assigned car practice on the price of coal to the public was a principal reason for his recommendation that the use of assigned cars for railway fuel should be abandoned. He states that he found the conditions surrounding the supply of railroad fuel to be the largest single factor in the price of coal to the public and the supply of labor for the production of coal, and sums up his conclusions as to the effect of the assigned car practice on the price of coal, as follows:

> "The unbalanced situation produced by contracts involving a full assignment of cars inevitably resulted in imposing upon the public a burden, which it would not have otherwise had to bear and which was of considerable magnitude. This was in part due to the fact that as soon as a given mine was compelled by car shortage to fall below a certain production, the per ton cost of operation mounted rapidly, thereby throwing an unwarrantably large burden upon the purchasers of coal, assuming a constant amount representing profit; and partly because of the fact that the prices forced upon the operators by the railroads for railroad fuel were at figures so near to cost that whatever profits were made by the operators were of necessity made from the purchasers of coal other than the railroads." (Pr. Rec., 82.)

His affidavit also affords interesting and persuasive evidence derived from railroad sources as to the extent of the saving made by the railroads at the expense of

the general public by the use of assigned cars. He states that the Railroad Administration resisted the proposal that it should give up the assigned car practice, and assigned as its ultimate reason for this resistance, the fact "that the principle of equal car distribution would throw upon the railroads an additional expense amounting in the aggregate to from $40,000,000 to $60,000,000." This statement related to the situation existing prior to July, 1918. Since then the cost of production of bituminous coal has materially increased, principally because of the increase in wages awarded by the Bituminous Coal Commission in 1920, and it is safe to assume that from $60,000,000 to $80,000,000 would now more nearly represent the profit which the railroads make at the expense of other coal consumers by the use of assigned cars.

A further injurious result of the assigned car practice noted by Dr. Garfield is the creation of unrest and dissatisfaction among mine workers. It is notorious that one of the prime causes of the wasteful and expensive labor troubles in the coal industry is irregularity of employment. This condition is, of course, intensified by the use of assigned cars. On this point Dr. Garfield said:

> "Operators having contracts for railroad fuel were able to ship coal substantially every day in the week; while other operators in the same field having no contracts for railroad fuel were compelled to close down their mines for lack of cars. This unbalanced condition threw large numbers of mine workers out of employment in the mines that were not furnishing railroad fuel, while in neighboring operations the labor found satisfactory employment. Affiant found this condition a subject of great and serious complaint among the mine workers, and that, at that particular time, namely, the spring and summer of 1918, it was of first importance to continue operations without suspensions and further that

conditions in the mining fields should be made so satisfactory to labor that the maximum of production could be secured." (Pr. Rec., 81.)

The Bituminous Coal Commission appointed by the President to adjust the wage controversy between bituminous mine workers and operators which had resulted in the 1919 strike in the bituminous coal fields also gave consideration to the assigned car practice, and in its report to the President it recommended (pp. 34-35):

"* * * that, wherever lawful, rules and regulations be issued governing and controlling car distribution between mines, to the end that no particular mine or mines may be permitted to obtain preferential car service through the use by railway purchasing agents, of their power to obtain railway fuel at reduced prices through the guaranteeing of car supply to favored mines or to operators with whom the railway may have fuel contracts.

We make this recommendation because we find that the practice and abuse of car guarantees has militated against the interests of the general public by contributing to the irregularity of operation of mines not having such preferential contracts. At the same time, it has resulted in an unfair competitive advantage to those mines that secured such contracts."

No attempt has hitherto been made in the case at bar to deny that the injurious consequences we have outlined do in fact flow from the use of assigned cars. The justification, and the only justification, which has been offered for the continuance of the practice is the claim that without assigned cars the carriers will not be able to get the fuel necessary to enable them to perform their public duties.

That this is the case is assumed rather than asserted in the reply made by the Commission to the Senate inquiry. The Commission there states that it freely invited the parties interested to suggest a "workable con-

crete plan" for supplying the carriers with fuel, as a substitute for the assigned car rule, and that none was offered, the nearest approach to such a plan being a tentative suggestion that some form of preferential contract for railway fuel could be devised. (Pr. Rec., 104.)

Prior to the passage of the Transportation Act, when the Commission's administrative jurisdiction was uncontrolled by any specific statutory rule applicable to coal car distribution, its opinion as to the expediency of the assigned car rule would not have been subject to review in this court. We submit, however, that it is not conclusive in a controversy as to the construction of paragraph (12).

What, in the Commission's view are the requisites of a "workable concrete plan" for supplying the carriers with fuel?

Is it essential to such a plan that they should be enabled not only to obtain fuel but to dictate the price which they will pay for it, and thereby inflict upon other consumers of coal a loss running to scores of millions of dollars annually?

If the supply of coal, and not an artificial and undue advantage over other consumers in the matter of price, is in fact what the Commission desires to obtain for the carriers, what are the extraordinary conditions in the coal industry which render it impossible for the carriers to obtain coal without also having the power to dictate the price?

The railroads collectively purchase a third of the bituminous coal produced in this country. The principal railroad corporations are individually among the largest purchasers of coal in the United States. Does not this concentrated purchasing power sufficiently guarantee the carriers all reasonable protection in the matter of their

fuel supply and its price without the additional weapon of an unlimited power of arbitrary discrimination in the use of their equipment?

The Commission's reply to the Senate inquiry does not indicate that it has considered these questions. But the circumstances in which paragraph (12) was incorporated in the Transportation Act, 1920, clearly demonstrate that Congress was deeply impressed by the abuses attendant upon the assigned car practice and that paragraph (12) was specifically designed to counteract those evils.

When the return of the railroads to private control came before Congress for consideration, the use of assigned cars for railway fuel had been forbidden by the Railroad Administration. This prohibition was ordered by the President as the direct result of representations made by the Fuel Administration as to the pernicious effect of the assigned car practice on the price and supply of coal to the public and on mine labor. (Pr. Rec. 11-17, 80-83.)

That paragraph (12) was based on this policy of the Railroad Administration and was intended to prevent the recrudescence of the evils of the assigned car system to which the Fuel Administrator had called attention is established by the report of the Committee on Interstate and Foreign Commerce to the House of Representatives. In reference to paragraph (12) this report made the following explanation:

> "The same section makes it the duty of every common carrier, or railroad, 'to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty

of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.' *During Federal control such a rule has been followed by the Director General and the committee follows the decisions of the Interstate Commerce Commission and the present practice* and has put in form of law what had been enunciated as proper practice." * * * (Report No. 456, page 17, 65th Cong. 2nd Sess.)

"Paragraph (12) of the amended section incorporates in the statute a rule laid down by the commission and upheld by the Supreme Court as to just and reasonable distribution of coal cars among the mines, THUS AVOIDING ANY POSSIBILITY OF THE RECURRENCE OF THE EVIL OF WHAT IS KNOWN AS 'ASSIGNED CARS.'" (Report No. 456, page 27, 65th Cong. 2nd Sess.)

The statement of the committee that it follows the decisions of the Interstate Commerce Commission has been seized upon by counsel for defendant to show that Congress intended to adopt the rule in the *Traer* case. But it will be observed that the committee also states that the bill follows the "present practice." There is an obvious error here. The "present practice" and the rule laid down by the decisions of the Commission were two entirely different things. The bill could not have followed both of them. The decisions of the Commission authorized the use of assigned cars for railway fuel. The "present practice,"—that is to say, the practice of the Railroad Administration at the time the bill was reported and until it was adopted, forbade the use of assigned cars for railway fuel.

The source of this mistaken identification of the practice of the Railroad Administration with that sanctioned by the decisions of the Commission, as well as a clear

indication of the real purpose of the committee, is to be found in the following colloquy between Chairman Esch of the committee and Chairman Clark of the Commission, which took place in the course of the hearing on the bill:

"The Chairman: Mr. Clark, are you familiar with the provision inserted in the Cummins bill with reference to coal car distribution? They have a section devoted to it.

Mr. Clark: I remember there is such a section, but at the instant I do not recall the particular provision.

The Chairman: *It seeks to carry into the law the orders of the Director General now with reference to car distribution.*

Mr. Clark: That leads me to say that in the earlier days of the Railroad Administration this very question of refraining from counting against the distributive share of the mine the cars that were sent for the carriers' own fuel supply came up. Some members of the Director General's staff favored going back to the old practice of the railroads; others of them favored following the rule laid down by us and sustained by the Supreme Court. We were asked for information and advice on the subject. *My understanding is that the rule adopted was based upon the principles laid down by us*, and that they are following the practice of counting those cars against the distributive shares of the mines.

The Chairman: You would be in favor of legislation of that kind being incorporated in any bill, so as to make it a statutory matter and not really a matter of regulation?

Mr. Clark: I can see no objection to it, although I do not see any crying necessity for it now, because I think that rule is almost, if not entirely, universal.

The Chairman: The idea expressed by the representative of the coal association was that when Federal control ended there might be a recurrence to the old practice?

> Mr. Clark: Well, I think that is the sound rule, and I think it is the right rule. It has stood the test of adjudication at the hands of our commission and at the hands of the Supreme Court of the United States. So I cannot see any possible objection to carrying it into the statute."
>
> Hearings before Committee on Interstate and Foreign Commerce of the House of Representatives on Return of Railroads to Private Ownership, pp. 2926-2927.

Chairman Esch and Chairman Clark were obviously at cross purposes in this colloquy. But it is perfectly clear that Chairman Esch considered the provision under consideration to be based on the "present practice," and he referred in his report to the decisions of the Commission only because Chairman Clark had erroneously informed him that the "present practice" followed those decisions.

That the committee was quite clear as to the purpose of incorporating the car shortage provision in the bill, however confused it may have been as to the precedents for its action, is further evidenced by the statement of Chairman Esch that the effect of the provision would be to avoid "any possibility of the recurrence of the evil of what is known as 'assigned cars.'"

Counsel for defendant have attempted to explain this language as referring to the evil of the assigned car practice as it existed prior to 1907, when the Commission established the rule in the *Traer* case, and this is the only possible explanation which will reconcile it with their theory that paragraph (12) was intended to embody that rule. But why should Congress propose in 1919 to legislate against an evil which had not existed since 1907? The return of the carriers to private control involved many grave problems of immediate ur-

gency. It would have been a singularly inept proceeding for Congress to turn aside from the consideration of those questions and devote a paragraph in the Transportation Act to prohibiting a practice of the carriers in coal car distribution which had been suppressed by the Interstate Commerce Commission upwards of ten years before and had never been resumed, and there is no possible ground for supposing that the committee in which the bill was framed was wasting its own time or that of Congress upon a dead issue.

On the other hand, there were notorious evils against which the existing decisions of the Commission provided no protection, and which might naturally be expected to recur immediately upon the return of the railroads to private control,—the evils which we have shown to be the result of the assigned car practice as sanctioned by the decisions of the Commission. It was against these that the Railroad Administration's prohibition of the use of assigned cars for locomotive fuel was directed, and it is too plain for argument that the committee's motive in adopting the practice of the Railroad Administration was to prevent the recurrence of those evils.

The burden of establishing our view of the meaning and effect of paragraph (12) has been sensibly increased by the fact that counsel for defendant were able to produce a public and official expression of the opinion of the Interstate Commerce Commission opposed to that view. The weight which an opinion of the Commission on the interpretation of a provision of the Interstate Commerce Act would naturally have and the importance of the question involved seemed to indicate the propriety of a thorough discussion of its theory as to the meaning of para-

graph (12) and of everything which had been urged in support of that theory, and it is this consideration which has induced us to devote more space to this branch of the argument than its intrinsic difficulty may seem to warrant.

We believe we have shown that the assigned car practice involved injuries of the most substantial and serious character to private rights and to the public interest which imperatively called for legislative interference; that paragraph (12) originated in a deliberate and definite intention to prevent the recurrence of these evils, and that the language of that paragraph is a clear and unambiguous expression of that intention. In the face of this complete and harmonious concurrence of a legislative motive to prohibit the use of assigned cars, a declared legislative purpose to act upon that motive, and a legislative act in pursuance of that motive and purpose, the opinion of the Commission that paragraph (12) does not prevent the use of assigned cars cannot prevail.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT PARAGRAPH (15) CONFERRED POWER ON THE COMMISSION TO RELIEVE THE CARRIERS OF THE OBLIGATION IMPOSED BY PARAGRAPH (12), OR TO PRESCRIBE A DIFFERENT RULE OF CAR DISTRIBUTION.

The decree of the Circuit Court of Appeals reversing the temporary injunction granted by the District Court and directing the dismissal of the bill was based entirely on paragraph (15) of Section 1 of the Interstate Com-

merce Act, which is set forth in full in the margin.* The court expressly held, in accordance with the view maintained under Point I of this argument, that paragraph (12) required the distribution of all cars available for transportation of coal in accordance with mine ratings. It also rejected the contention of defendant that even if this was the true construction of paragraph (12), the Commission was authorized to suspend the operation of that paragraph by clause (a) of paragraph (15) which confers power to suspend rules, regulations and practices with respect to car service, and had done so in the notice of April 15, 1920. But it held that this notice was a valid exercise of the authority vested in the Commission by clause (d) of paragraph (15) "to give directions for preference or priority in transportation, embargoes or movement of traffic under

*(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

permits," and that it superseded the car shortage provision of paragraph (12).

That the Court of Appeals was right in holding that the Commission's notice did not conform to the terms of paragraph (12) has, we believe, been fully established. There remain to be discussed the theory of counsel for defendant that the notice was a valid exercise of the power conferred by clause (a) of paragraph (15), and the theory of the Court of Appeals that it was justified by clause (d) of that paragraph.

As we shall show later, the reason given by the Court of Appeals for rejecting the defendant's theory—that the car shortage provision of paragraph (12) is not a rule or regulation within the meaning of clause (a) is undoubtedly sound. But in holding that the Commission's notice was authorized by clause (d), the court overlooked fundamental considerations which we believe to be conclusive against the proposition that any part of paragraph (15) authorizes the Commission to take any action inconsistent with the car shortage provision of paragraph (12).

We contend:

First, that the sole purpose of paragraph (15) is to enable the Commission to control the use by carriers of their equipment and facilities in the movement of freight, for the purpose of preventing or remedying car shortages and congestion of traffic, and that the method of distributing cars among shippers during the existence of a shortage is wholly outside its scope and purpose.

Second. That even if paragraph (15) should be construed as conferring on the Commission authority over the distribution of cars among shippers, such authority does not extend to the making of directions or orders inconsistent with the express statutory requirement of paragraph (12).

Third. That paragraph (15) should not be construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12) or to give directions inconsistent with that provision, because, if it is so construed, it involves an invalid delegation of legislative power.

Fourth. That the purpose and intent of Congress with reference to the transportation of coal evidenced by the enactment of paragraph (12) will be wholly defeated if paragraph (15) is construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12), or to give directions inconsistent with that provision.

1. Paragraph (15), Section 1 of the Interstate Commerce Act confers upon the Interstate Commerce Commission no authority over the distribution among shippers of the cars available during periods of car shortage.

The theory of the defendant that the Commission was authorized to suspend the operation of the car shortage provision of paragraph (12) by clause (a) involves the proposition that the term "car service" used in clause (a) includes the distribution of cars among shippers.

The theory upon which the Court of Appeals sustained the Commission's order of April 15, 1920, involves the proposition that the phrase "preference or priority in transportation" used in clause (d) includes preference or priority in car distribution as between particular shippers or classes of shippers.

We contend that neither of these propositions can be sustained—that the term "car service" has no reference to the relations between individual carriers and their patrons, and that the expression "preference or priority in transportation" refers only to preference or priority in the use of the equipment and facilities of

the carriers for the movement of freight after it has come into the carrier's possession. These contentions are closely related to each other and will be considered together.

Paragraphs (10) and (11) and paragraphs (13), (14) and (15) of Section 1 are the first five paragraphs of the Esch Car Service Act, approved May 29, 1917 (40 Statutes at Large, 101), with some additions made by the Transportation Act, 1920, and the key to the construction of paragraph (15) and every part of it is to be found in the meaning of the term "car service" and in the reasons which induced Congress to give the Commission jurisdiction over the field which it designates.

The Esch Car Service Act was the direct result of the unusual transportation conditions which arose in the fall of 1916. In some districts the accumulation of cars was so great as to overtax the operating facilities of the railroads, and long delays in transit resulted. In other localities the supply of cars was wholly insufficient to supply the demands of shippers. The Interstate Commerce Commission instituted an investigation as a result of which it found that the principal cause of this condition was the failure of the carriers to observe the Code of Car Service Rules which dealt with the return of foreign cars to their owners.

Car Supply Investigation, 42 I. C. C. 657, 662.

These rules, which are set forth in the Appendix to the Commission's report (42 I. C. C. 679), had no relation to the distribution of cars by the carriers among their patrons. Each carrier dealt with that subject under rules of its own, commonly called Car Distribution Rules. The Code of Car Service Rules was promulgated by The American Railway Association for all the carriers and was concerned exclusively with intercarrier

relations arising out of the movement of freight cars beyond the lines of their owners. It provided for the method of return of such cars to the owning lines and the terms upon which they might be used by the non-owning carrier pending such return.

In view of the general failure of the carriers to observe these car service rules, and the consequent disturbance of transportation conditions the Commission was urged by many of the parties in interest to make an order, and this was finally done. The Commission's report, however, discloses the existence of a serious doubt as to the Commission's jurisdiction in the premises. Three Commissioners declined to concur in the order on the ground that it was beyond the Commission's power, and the majority went no further than to hold that in view of the exigency of the situation, the doubt as to jurisdiction should be resolved in favor of the order. 42 I. C. C. 674.

While this investigation was still pending, the Commission made its annual report to Congress for the year 1916. This report contained an elaborate discussion of the causes of freight car shortages and of the question of jurisdiction involved in the Car Supply Investigation and made the following recommendation (p. 73):

> "From these facts and experiences and a study of these considerations over a substantial period we are led to the conclusion that a reasonable degree of the desired and necessary improvement can be reached within any reasonable time only by vesting power to regulate these questions for all railroads in the appropriate federal body, and also providing means by which rules and regulations promulgated can be enforced. We recommend that the Commission be given definite and specific authority to prescribe for all carriers by rail subject to the act rules and regulations governing *interchange of cars, return of cars to the owning road, the conditions and*

circumstances under which such cars may be loaded on foreign roads, and the compensation which carriers shall pay to each other for the use of each other's cars.''

It was in consequence of this recommendation that the Esch Car Service Act was passed. The first paragraph of the act defined car service as follows:

> ''The term 'car service' as used in this act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this act.''

The second paragraph required the carriers to establish reasonable rules, regulations and practices with regard to car service. The third paragraph authorized the Commission to require such rules and regulations to be published by the carriers. The fourth paragraph authorized the Commission, after hearing, to establish just and reasonable rules, regulations and practices with respect to car service.

The fifth paragraph was as follows:

> ''Whenever the Commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission, and also authority to make such just and reasonable directions with respect to car service during such time as in its opinion will best promote car service in the interest of the public and the commerce of the people.''

It is plain that this statute had no application to the distribution of cars among shippers. In the first place the term "car service" adopted by Congress to describe the subject matter of the legislation had never been applied by the railroads to that branch of railroad activity. It designated only the intercarrier relations covered by the Car Service Rules above mentioned. In the second place, the recommendation of the Commission pursuant to which the act was passed did not refer to car distribution among shippers. It was confined to the precise field designated by the term "car service" in railroad usage. And finally, the regulation of car distribution was wholly beyond the scope and purpose of the act and bore no relation to the end which it sought to accomplish. The method of distributing cars among individual shippers was not a subject of agitation during the emergency which arose in the fall of 1916. If it had been the Commission was fully authorized to deal with it without additional legislation. After the decision by this court in *Interstate Commerce Commission* v. *Illinois Central Railroad Company,* 215 U. S. 452, in 1910, no question had existed as to the Commission's jurisdiction over the rules and practices of the carriers in this field, and in the very report in which the Commission pointed out the necessity of legislation to establish its authority over "car service," *it expressly drew the attention of Congress to the fact that its authority over car distribution was unquestionable.*

Report of Interstate Commerce Commission, 1916, page 72.

It was the distribution of cars among carriers and not the distribution of cars by individual carriers among shippers upon which the attention of Congress was concentrated when the Esch Car Service Act was passed.

The outstanding features of the situation existing in the fall of 1916 were abnormal congestion of equipment in some districts and consequent acute car shortages in other localities. Additional powers were sought by the Commission and granted by Congress to enable the Commission to deal with this and like situations, by compelling the redistribution of cars among the different carriers. In other words the purpose of the Esch Car Service Act was to enable the Commission to prevent or cure car shortages and congestion of traffic by eliminating certain of their causes. The relation between the individual carrier and his patrons during the continuance of a car shortage was wholly beyond its scope.

The car service provisions thus enacted remained in force until the passage of the Transportation Act, 1920, by which they were so amended as materially to increase the scope of the Commission's authority. The definition of car service was enlarged, and in paragraph (15) authority to require the common use of terminals and to exercise a broad control over the movement of traffic was added to the emergency powers originally granted by the fifth paragraph of the Esch Act. But a brief analysis of these amendments will demonstrate that they did not involve any change in the fundamental purpose of the original legislation or bring within its scope anything not directly related to that purpose.

The enlarged definition of car service introduced by the Transportation Act is embodied in paragraph (10) Section 1 of the present statute. It may be conveniently compared with the original definition by setting forth paragraph (10) with the additions made to the original definition printed in italics, as follows:

> "The term 'car service' in this act shall include the *use, control, supply,* movement, distribution, exchange, interchange and return of *locomotives,* cars,

and other vehicles used in the transportation of property, *including special types of equipment and the supply of trains*, by any carrier by railroad subject to this act."

It will be observed that one of the principal purposes of this amendment was to bring within the purview of the statute which, in its original form, included only freight cars, every kind and description of rolling stock used in the transportation of freight, including combinations of different elements of such equipment into trains. This purpose accounts fully for every word added by the amendment except the words "use," "control" and "supply." Manifestly these are not the words Congress would have used to bring car distribution among shippers, a wholly foreign subject, within the statutory definition of car service. Of the three, the word "supply" is the only one which even loosely suggests a reference to the delivery of cars by a carrier to a shipper, and it is perfectly clear that Congress did not use it in that sense in paragraph (10).

In railroad usage, the term "car supply" is used in connection with the stock of cars available to meet the demands of shippers. The apportionment of that stock among the individual shippers is called "car distribution." When the Transportation Act was passed the inadequacy of the "car supply" of the carriers was glaring and notorious. For some years before that time and especially during the period of government control, the increase in the equipment of the carriers had lagged far behind the increase in the demands upon it, and this court had decided in *United States* v. *Pennsylvania Railroad Company*, 242 U. S. 208, that the Interstate Commerce Commission was without jurisdiction to require a carrier to provide itself with additional equipment. In other words, there existed in 1920 with reference to "car

supply" a situation precisely analogous to that which had brought about legislation with reference to "car service" in 1917—a condition tending to produce car shortage and a lack of power in the Commission to remedy that condition. The obvious course for Congress to adopt was to bring the carrier's duty to supply itself with equipment within the scope of the car service provisions and thus within the Commission's jurisdiction, and this was precisely what Congress did in the Transportation Act.

In paragraph (11) of Section 1, it added to the requirement of the second paragraph of the Esch Car Service Act that the carriers should establish just and reasonable rules, etc., as to car service, the requirement that they should "furnish safe and *adequate* car service." In paragraph (21), Section 1, it authorized the Commission to require any carrier "to provide itself with safe and *adequate* facilities for performing as a common carrier its car service, as that term is used in this act." And in order to bring the statutory definition of car service into harmony with this enlarged conception it added the word "supply" to the definition of car service in paragraph (10).

This conclusion is strikingly corroborated by the testimony of Chairman Clark of the Interstate Commerce Commission at the hearing on the return of the railroads to private control, as to the reason for introducing the word "supply" into paragraph (10). He did not suggest or intimate that it referred to the supply of cars to individual shippers, but after referring to the fact that under existing law the Commission had no authority to compel a carrier to increase its equipment, he pointed out that the addition of the word "supply" to the definition of car service would remedy this defect in jurisdiction, and

enable the Commission to require a carrier to supply itself with locomotives, cars and other equipment.

> Hearings before House Interstate Commerce Committee on Return of Railroads to Private Ownership, pp. 11-12.

We do not overlook the fact that the word "distribution" also occurs in paragraph (10). But it is not one of the added words. It appears in the original definition. In that connection, as we have shown, it refers only to the distribution of cars as between different carriers, and, under the elementary rule of construction applied to language carried over into an amended statute from the original on which the amendment was based, it cannot receive a broader construction in paragraph (10). The very fact that it appears in paragraph (10), and that it is not applicable to the distribution of cars among shippers, strongly emphasizes the inaptness for that purpose of the word "supply" and the other words added by the amendment.

Passing to the consideration of paragraph (15) it is to be observed that the emergency powers which it vests in the Commission are created for the same ultimate purpose as the powers granted by paragraph (11), (13) and (14), namely, to enable the Commission to prevent or cure traffic congestion and shortage of equipment. This is even more explicitly stated in paragraph (15) than in its prototype, the fifth paragraph of the Esch Car Service Act. That paragraph authorized the exercise of the powers it conferred "whenever the Commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property." Evidently Congress considered it advisable to accompany the increase in the emergency powers of the Commission

made by paragraph (15) with a more carefully guarded statement of the conditions which would justify their use, and it therefore substituted for the broad language above quoted, the following,—"whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists," etc. The expression "or other emergency" was doubtless inserted to enable the Commission to forestall threatened shortage of equipment or traffic congestion by dealing promptly with emergencies which might be expected to produce either condition. To give it any broader construction would violate the familiar rule established by the authorities cited, *infra*, that the meaning of a general expression is controlled and limited by the particular expressions with which it is associated.

This view is corroborated by the character of the emergency powers conferred by paragraph (15). Clauses (a) and (b) enable the Commission to substitute temporarily for the routine rules, regulations and practices governing car service, directions appropriate to emergency conditions. Clause (c) authorizes it to require joint or common use of terminal facilities. Clause (d) confers a broad control over the movement of traffic. All of these powers are manifestly appropriate for the purpose of insuring the distribution of equipment among carriers, and the movement of freight, in the manner best calculated to correct equipment shortage and traffic congestion, and the language in which they are granted is fully and satisfactorily accounted for upon the theory that they were designed for that purpose alone.

The opposing view urged by the defendant in the court below, that clause (a) authorized the Commission to suspend the operation of the car distribution provision of paragraph (12) does not require extended discussion here. What has already been said with respect to the

definition of the term "car service" demonstrates that the power to suspend car service rules, regulations or practices granted by clause (a) does not include any authority over the distribution of cars by a particular carrier among its patrons. The same observation applies to the power granted by clause (b) to give directions as to car service.

Clause (d), upon which the Court of Appeals based its decision, is not expressly limited to the field of car service, but the view of the Court of Appeals that it includes car distribution is quite as untenable as that of the defendant with regard to clause (a). Specifically stated, the theory of that court was that the phrase "preference or priority in transportation" includes preference or priority in the distribution of cars by an individual carrier among its patrons. This theory involves the proposition that by this single phrase Congress brought within the drastic emergency powers conferred by paragraph (15) a wholly new matter not in any way related to the purpose for which those powers were granted.

Clauses (a) and (b) do not relate to car distribution among shippers. Clause (c) deals only with the use of terminal facilities. Embargoes and movement of traffic under permits, which are coupled with preference or priority in transportation in clause (d) are not car distribution matters. An embargo, like any other impediment to traffic,—a washout or the destruction of a bridge—might in a particular case serve as an excuse for a carrier's failure to comply with a car distribution rule, but the embargo itself has to do solely with the movement of traffic, and its function is to prevent or relieve traffic congestion.

Hence, if the theory of the Court of Appeals is accepted, we are required to believe that Congress, having

adhered consistently throughout the preceding car service provisions to the plan of granting the Commission such powers as would enable it to prevent or correct car shortage and traffic congestion, suddenly and without apparent reason turned aside in the first half of clause (d) to the irrelevant subject of the distribution of cars by individual carriers among their patrons, and then as suddenly returned to its original plan.

The improbability that Congress intended the phrase "preference or priority in transportation" to include preference in car supply to individual shippers is increased when it is considered that the authority granted by paragraph (15) may be exercised without notice or hearing. The Esch Car Service Act had set the precedent for granting this unusual and extraordinary power in connection with certain intercarrier relationships and its extension to other intercarrier relations in paragraph (15) was a logical development of the legislative policy of the original act. The extension of the same power to the carrier-shipper relationship involved in car distribution is a wholly different matter. If the provisions of paragraph (15) are confined to intercarrier relationships, the possibility of injury and injustice from improvident orders made without hearing is minimized by the provision for subsequent hearings to determine questions of compensation as between the parties affected. That it would be practicable to extend any such protection to the shipper is not clear. In any event there has been no attempt to do so. If the relation of the shipper to the carrier which serves him is within paragraph (15), the shipper is without protection against the making of an order affecting that relation, and without remedy when the order has been made.

We shall not discuss at this time the interesting question of the power of Congress to subject carrier-shipper

relations to administrative control of this character. We do assert, however, that if Congress had intended to subject them to any such control, it would not have done so except upon grave consideration and in express and unmistakable terms. It certainly has not done this in paragraph (15). "Preference or priority in transportation" does not designate car distribution nor distinguish it from any one of the numerous activities that may conceivably be covered by the word transportation. To hold that it was used for the purpose of bringing that subject within the scope of the extraordinary powers granted to the Commission by paragraph (15) is to ascribe to the proceedings of Congress in the premises an extremely casual character.

We submit that it is quite unnecessary and therefore wholly improper to attribute such haphazard and inconsequent conduct to Congress. The natural and logical view is that "preference or priority in transportation" is complementary to "embargoes" the latter representing an impediment and the former a stimulant to the movement of traffic. So construed clause (d) takes its proper place in the legislative scheme for the prevention and cure of traffic disturbance. Construed in accordance with the decision of the Court of Appeals, it represents an inexplicable departure from that scheme.

The doctrine that general expressions in a statute are to be given the specific meaning indicated by their context, and by the purpose for which the statute was enacted, is a firmly established canon of statutory interpretation.

In *Neal* v. *Clark,* 95 U. S. 704, the question arose whether constructive fraud was a bar to the discharge of a bankrupt under the section of the bankruptcy law of 1867 which provided that "no debt created by fraud or embezzlement of the bankrupt or by defalcation as a

public officer or while acting in a fiduciary capacity shall be discharged under this act." This court held that the association of the words fraud and embezzlement required the conclusion that Congress had in mind only fraud involving moral turpitude, and that constructive fraud was therefore not within the statute. Mr. Justice Harlan stated the applicable rule of construction as follows (pages 708-709):

> "It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.' In Broom's Legal Maxims, p. 450, it is said: 'It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu*,—the coupling of words together shows that they are to be understood in the same sense. And where the meaning of any particular word is doubtful or obscure * * * the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words.' The same author says (p. 455): 'In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the context, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject matter.'"

In *United States* v. *Stever*, 222 U. S. 167, Sec. 3894 of the Revised Statutes was before the court for construction. It forbade the use of the mails to carry letters, postal cards or circulars "concerning any lottery, so-called gift, concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money under false pretenses."

An indictment in two counts, each of which set up the use of the mails to obtain money under false pretenses not connected with any lottery or similar scheme had been returned. One of these counts was predicated upon the section above mentioned and the other upon Section 5480.

It was contended upon the part of the United States that the fraud set forth in the indictment was a scheme "devised for the purpose of obtaining money or property under false pretenses" within the meaning of Section 3894. This contention was rejected by the court upon the ground that the context demonstrated that the statute was directed against the use of the mails to promote lotteries and other like enterprises, and the general language relied upon by the government must be restricted to schemes of that character.

The court said (page 174):

"The two sections are intended to prevent the use of the mail for certain purposes. The one applies to the use of the mail for the purpose of promoting lotteries or other like schemes of chance. The other is intended to prohibit the use of the mail to carry on schemes of general fraud, the language being 'any scheme or artifice to defraud.' A scheme to defraud by means of false pretenses is, as we have seen, 'a scheme or artifice to defraud,' within the plain meaning and purpose of this section. *The general words, or concerning schemes devised for the purpose of obtaining money or property under false pretenses,' found in* § 3894, *do not harmonize with the general purpose of that section, if construed as urged by the learned Attorney General.* So construed, they would trench upon the ground covered by § 5480. The words referred to follow particular words descriptive of schemes of gain dependent upon chance, and are followed by further particular words relating to the same kind of lottery schemes.

In such circumstances, *unless there is a clear manifestation to the contrary, general words, not*

specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words."

In the recent case of *United States* v. *Salen*, 235 U. S. 237, the question was as to the sufficiency of an indictment for making a false statement in the declaration required of an importer by the Tariff Act of 1909. The statute prescribed the form of the declaration and required the bill of lading, consular invoice and entry list of the goods to be attached to it.

All of the statements in the required form of declaration referred expressly to the annexed documents except one, namely, that nothing had been suppressed by the importer or by any other person to his knowledge whereby the United States might be defrauded of duties. The indictment charged that the declaration was false in that the importer had suppressed facts regarding previous importations from the same foreign consignor which if disclosed would have awakened the suspicion of the collector as to the invoice valuation of the goods to which the declaration related.

The court held that the indictment stated no offense for the reason that statement as to suppression of facts required by the statute must be held to refer only to facts connected with documents required to be annexed to it.

Mr. Justice Lamar said (page 249):

"To say that the sixth clause in this enumeration was intended to embrace undefined extraneous matter, would be *to suddenly depart from the particular to the general and back again from the general to the particular;*—from the particular subject of documents, to which the attention of the affiant had been specially directed by the first five clauses, into a general field of wide and indefinite scope and—in the seventh clause—again to return to the particular subject of documents. Such an interpretation would

> give an exceedingly liberal construction to a statute defining a felony. *It would ignore the fact that the meaning of words is affected by their context and violate the settled rule that words which standing alone might have a wide and comprehensive import will, when joined with those defining specific acts, be interpreted in their narrower sense and understood to refer to things of the same nature as those described in the associated list, enumeration or class.*"

See also, to the same effect,

Virginia v. *Tennessee*, 148 U. S. 503, 519.

The doctrine of these cases is peculiarly applicable to the car service provisions of the Interstate Commerce Act. The purpose and scope of the original car service act is capable of unusually exact definition. It cannot possibly be contended that the distribution of cars among shippers was within it. The present car service provisions preserve the form and structure of the original act, and all of its substantive provisions. There is nothing in the additions made by the Transportation Act which suggests any change in the original purpose of the legislation. On the contrary, their general tenor clearly demonstrates that what Congress had in mind was simply the creation of additional means for the accomplishment of that purpose.

In these circumstances we insist that particular expressions which, standing alone, might be capable of a broader meaning, must, under the rule stated in the cases cited, be construed in a manner which will bring them into harmony with their context and with the governing purpose of the statute.

2. Even if paragraph (15) should be construed as conferring upon the Commission authority to give directions as to the distribution of cars among shippers, such authority cannot be held to extend to the giving of any direction inconsistent with the express statutory requirement of paragraph (12).

The theory that the Commission's notice of April 15, 1920, may be justified as an exercise of a power conferred by paragraph (15) involves holding not merely that car distribution among shippers is within the scope of that paragraph, but also that directions as to car distribution given under paragraph (15) are controlling even though they are squarely in conflict with an express statutory provision.

The second of these propositions cannot be deduced from the first. Even if the court should be of the opinion that paragraph (15) confers power over car distribution it does not follow that it authorizes the Commission to exercise that power in total disregard of statutory provisions relating to the same subject matter. On the contrary, we contend and shall maintain in this division of the argument, that there is not the slightest indication in paragraph (15) of any intention on the part of Congress to authorize the Commission to suspend the operation of any statutory provision or give any direction in conflict with the terms of such a provision, and that even if it confers power over the distribution of cars among shippers in general that power is subject and subordinate to the car shortage provision of paragraph (12).

Discretionary powers vested in an administrative body are always subject to all limitations imposed by the will of the legislature, and these limitations are to be found not only in the specific terms in which the power is granted, but in all substantive statutory provisions af-

fecting the subject matter of the grant. This restriction is inherent in the very nature of administrative discretion to make rules and regulations or issue orders or directions. Such discretion exists only to further the purpose of legislative acts by filling in the details for which the legislature has not specifically provided. In so far as the will of the legislature as to a given subject has been specifically declared, there is neither occasion nor opportunity for the exercise of discretionary authority of an administrative character. Hence a specific mandate of the legislature will always override a general grant of administrative power even though the terms of the latter may include the subject matter of the former.

This doctrine was succinctly stated in the case of *United States* v. *Symonds*, 120 U. S. 46, in which the court held that an order of the Secretary of the Navy was invalid for the reason that it was in conflict with an Act of Congress. The court said (at page 49):

> "The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, *necessarily implied*, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with *Gratiot* v. *United States*, 4 How. 80, and *Ex parte Reed*, 100 U. S. 13, upon which the government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith* v. *Whitney*, 116 U. S. 181. In neither case, however, was it held that such

regulations, when in conflict with the acts of Congress, could be upheld."

This general principle is so elementary and so well established that it is unnecessary to multiply citations in support of it. The following are a few of the cases in which it has been held that a power vested in an administrative officer to make rules or regulations will not be construed to include a power to alter or amend a statute or destroy a statutory right:

Morrill v. *Jones*, 106 U. S. 466.
United States v. *United Verde Copper Company*, 196 U. S. 207.
Williamson v. *United States*, 207 U. S. 425.
United States v. *Grimaud*, 220 U. S. 506.

That this rule controls the construction of provisions of the Interstate Commerce Act granting discretionary powers to the Commission does not admit of doubt. Its application has been fully recognized by the Interstate Commerce Commission and by this Court in the cases arising under Section 4 of the act.

That section as amended in 1910 forbade any carrier subject to the Act to charge a greater compensation for a shorter than a longer haul of persons or property, the shorter distance being included within the longer, but provided "that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

This amended section came before the Commission in *Railroad Commission of Nevada* v. *Southern Pacific Co.*

21 I. C. C. 329, and the Commission held that in spite of the broad and unqualified language in which Congress had conferred the authority to relieve carriers from the operation of the section, it must be held that there was incorporated in Section 4 "every standard set up by Congress as a guide to this Commission which is to be found in any section of the Act." It stated its conclusion as to the extent of its power under the proviso as follows (page 341):

> "That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but *its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and* IN NOWISE ANTAGONISTIC TO OTHER PROVISIONS OF THE ACT."

And the Commission therefore held that in passing upon an application by a carrier for relief from the operation of the fourth section it was bound by the prohibition of the third section against undue preferences.

The carriers sought to enjoin the Commission from enforcing the order made in that case, and the question of the construction of the fourth section eventually came to this Court, which sustained the view taken by the Commission and held that the authority of the Commission under the fourth section was limited by the provisions of the third section. *Intermountain Rate Cases*, 234 U. S. 476.

These cases are controlling upon the question of the construction of paragraph (15). The power given to the Commission to authorize carriers to charge less for a longer than for a shorter haul is conferred in language quite as absolute and unqualified as that in which paragraph (15) confers authority to give directions, and there is no material or essential difference between para-

graph (12) and Section 3. Both prescribe rules of conduct for the carriers and make the violation of such rules unlawful. If the Commission is not authorized by the unqualified grant of authority contained in Section 4 to relieve the carriers from the obligation to obey the mandate of Section 3, it necessarily follows that paragraph (15) does not authorize it to set aside the requirement of paragraph (12).

It is true that Section 3 prescribes a rule of conduct applicable generally to all the activities of the carriers, whereas the rule embodied in paragraph (12) is specific and applies only to a particular activity. But this difference is wholly immaterial when the question of the statutory restrictions on the Commission's power is under discussion. It is not usual for Congress to interest itself in the details of the rules controlling the practices of the carriers, but the fact that it has been the legislative practice to leave such matters to the discretion of the Commission does not impair the authority of Congress to withdraw such discretion or restrict it, and when it exercises that authority by enacting a specific car distribution rule, the rule becomes as much a part of the statutory system for the regulation of commerce as any other substantive provision of the act, and quite as binding on the Commission.

The Court of Appeals has not discussed the question of the construction of clause (d) from this viewpoint. The entire reasoning of the court upon this question is contained in the following excerpt from its opinion (Pr. Rec., 129):

> "Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation and unexpected needs of the public which cannot be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had

guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that 'whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority * * * (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them.' "

It will be observed that the court infers the existence of the power to suspend the operation of paragraph (12) solely because, as it says, "Congress could not have intended to guard the private interests of the mines by an inflexible enactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it."

It is, we submit, somewhat remarkable that the court could see nothing in paragraph (12) but a purpose to guard "the private interests of the mines," when it appears without contradiction upon the record in this case that one of the primary reasons for the abandonment by the Railroad Administration of the use of assigned cars for railway fuel was the indisputable fact that the practice resulted in transferring to the rest of the consuming public a financial burden amounting to scores of millions of dollars which should be borne by the rail-

roads. In the face of this fact, how can it possibly be assumed that the action of Congress in adopting paragraph (12) was dictated solely or even principally by a tenderness for the private interests of the coal operators?

This erroneous assumption on the part of the court is alone sufficient to vitiate its conclusion as to the meaning of clause (d). Assuming that Congress might have considered it warrantable to provide against "unforeseen contingencies" which might prove injurious to the public welfare, by enabling the Commission to suspend a statute which protected merely private interests, it by no means follows that the same motive would induce it to entrust to the Commission or any other agency of Government, the power to reinstate the assigned car practice. Indeed, as between the gross and palpable public injury caused by that practice, and the vague category of "unforeseen contingencies" referred to by the court, Congress might well prefer to incur the chance of the latter rather than the certainty of the former.

The fundamental objection, however, to the court's view as to the probable intention of Congress is that it is irrelevant. The attitude of the court toward the construction of clause (d) bears a close resemblance to that of the Commission toward paragraph (12). Having arrived at the conclusion that some provision ought to have been made for a relaxation of the rule of paragraph (12) to provide against unforeseen contingencies, it assumes that Congress made such a provision.

There is nothing in the language of the statute which lends any color to this assumption. There is no suggestion in paragraph (12) of any intention to permit any relaxation of the rule which it prescribes. On

the contrary it is evident that Congress regarded the strict observance of the rule as of peculiar importance since it took the unusual step of attaching a specific and severe penalty to its violation. Nor would it help the case to adopt the view taken by the Court of Appeals that the language of clause (d) includes car distribution since, as we have shown, that language is subject to the condition "necessarily implied" that it must be exercised within the restrictions imposed by paragraph (12).

The rule of construction which requires this condition to be implied in a grant of discretionary authority to an administrative body is neither technical nor arbitrary. It is the application of common sense to the problem of ascertaining the legislative intention. Congress takes for granted, and it is entitled to take for granted, that the agencies which it creates to carry out its enactments will accept its mandates as conclusive. To require it to qualify every general grant of administrative authority with provisos and exceptions to prevent the delegated authority from being exercised in derogation of statutory provisions would be absurd. It follows that every substantive statutory requirement must be regarded as binding on agencies of the government exercising merely administrative authority, unless the contrary intention is clearly and specifically expressed.

That Congress does in fact proceed upon this theory is amply shown by the Interstate Commerce Act itself. In Section 4, to which reference has been made already, the prohibition against making a greater charge for a shorter haul than for a longer haul is coupled with a proviso explicitly authorizing the Commission in special cases to relieve the carrier from the operation of the prohibition.

Paragraph (2) of Section 3 prohibits carriers sub-

ject to the Act from relinquishing possession of freight at destination until all tariff rates and charges have been paid "except under such rules and regulations as the Commission may from time to time prescribe," etc.

Paragraph (9) of Section 5 prohibits any common carrier subject to the Act from owning, controlling or having any interest in any competing common carrier by water, and paragraph (11) expressly confers upon the Commission power to authorize the continuance of service by a common carrier by water so owned or controlled and not operating through the Panama Canal, if in its opinion such operation will not prevent, exclude or reduce competition on the water route in question and is in the public interest.

Paragraph (3) of Section 6 prohibits any change in published rates except upon thirty days' notice to the Commission and the public, "provided that the Commission may in its discretion for good cause shown allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting or filing of tariffs either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

Paragraph (8) of Section 15 confers on the shipper the right to designate the through route by which his property shall be transported "subject to such reasonable exceptions or regulations as the Interstate Commerce Commission shall from time to time prescribe."

The foregoing does not exhaust the category of provisions of this character which may be found in the Interstate Commerce Act, but it is amply sufficient to show that when Congress desires to entrust the Commission with a discretion to make exceptions to a substantive provision of the statute, it takes care to do so in explicit and unmistakable terms either by way of a proviso or an ex-

ception incorporated in the provision itself or, as in the case of the provision as to the control of competing water carriers, by a separate clause referring specifically to the subject matter of that provision. And it is not only the natural but the necessary inference from the fact that no such exception was incorporated in paragraph (12) and no specific grant of power to relieve from its operation appears in any separate provision of the statute, that Congress did not intend to entrust any discretion to the Commission to relieve the carriers of the obligation to apply mine ratings which it imposed.

The course pursued by Congress in connection with Section 5 of the Interstate Commerce Act is peculiarly instructive in this connection. Prior to the adoption of the Transportation Act, paragraph (1) of Section 5 provided,

> "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof."

On June 2, 1919, a bill to amend the Interstate Commerce Act was introduced in the House of Representatives (H. R. 4378), and the amendments proposed in this bill were in the main ultimately incorporated with some changes in the Transportation Act of 1920. This bill provided that Section 5 should be amended so as to permit pooling agreements to be authorized by the Interstate Commerce Commission in certain contingencies. The language of the amended section so proposed was in part as follows:

> "That except upon specific approval by order of the Commission as in this section provided it shall

be unlawful for any common carrier subject to this act to enter into any contract," etc.

When the legislation for the return of the railroads to their owners assumed its final form in the conference committee of the House and Senate there had been added to the amendments to Section 1 of the Interstate Commerce Act originally proposed by the House Bill above referred to, the provision which now appears in the Interstate Commerce Act as paragraph (16) of Section 1, immediately following the paragraph of which clause (d) is a part.

Paragraph (16) reads as follows:

> "Whenever the Commission is of opinion that any carrier by railroad subject to this act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable."

Obviously the exercise of the Commission's authority under this paragraph would require the carriers affected to enter into negotiations looking to agreements of the character prohibited by paragraph (1) of Section 5. Upon the theory adopted by the Court of Appeals with regard to clause (d) of paragraph (15), the enactment of paragraph (16) would of itself exempt the agreements which it contemplated from the operation of Section 5, just as the Court of Appeals held that the enactment of Clause (d) exempted the directions made by the Commission from the operation of paragraph (12).

Congress, however, did not proceed upon this theory, for when it introduced paragraph (16) into the bill, it further amended paragraph (1) of Section 5, and in the bill as reported from conference and finally adopted that section read as follows:

> "That except upon specific approval by order of the Commission as in this section provided, and *except as provided in paragraph* (16) *of Section* 1 *of this act,* it shall be unlawful for any common carrier subject to this act to enter into any contract, agreement, or combination," etc.

Paragraphs (12), (15) and (16) of Section 1 and the amended paragraph (1) of Section 5 were all parts of the same legislative act, and the inference is irresistible that if Congress had intended paragraph (15) to authorize the giving of directions which would infringe on the mandate of paragraph (12) it would have added to the latter paragraph a proviso or exception expressly exempting from its operation directions given under that clause.

Under the authorities we have cited and in the light of the uniform practice of Congress in conferring discretionary power on the Commission to make exceptions to statutory rules as shown by the instances above referred to, the absence of any express grant of such power, either by way of an exception or proviso incorporated in paragraph (12) or by specific language in paragraph (15) is entirely inconsistent with the view that Congress intended paragraph (15) to authorize the making of directions which would infringe on the rule prescribed by paragraph (12), and it was not competent for the Court of Appeals to supply the omission of Congress to confer this authority.

The cases cited as to the construction of paragraph (12) under Point I of this Argument (*supra,* pp. 41-44) are clearly in point upon this proposition, and the follow-

ing language used by this court in *Bate Refrigerating Company* v. *Sulzberger*, 157 U. S. 1, at page 36, is also peculiarly applicable:

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden* v. *Collector*, 5 Wall. 107, 111, 'what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * *It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.*' *Scott* v. *Reid*, 10 Pet. 524, 527."

Counsel for defendant appear to have been conscious of the instability of a position founded on the doctrine that a mere administrative authority to give directions included the power to override statutory provisions, and in the court below they vigorously insisted that power to suspend the operation of the car shortage provision of paragraph (12) was expressly conferred by clause (a) of paragraph (15), which authorizes the Commission to suspend rules, regulations and practices with respect to car service.

One fatal objection to that contention we have already pointed out—namely, that the term "car service" has no reference to the distribution of cars among shippers. Another obvious and equally fatal objection is that

paragraph (12) is not a rule or regulation nor is the course of conduct which it prescribes a practice within the meaning of those expressions as used in clause (a).

This view was succinctly stated by the Court of Appeals as follows (Pr. Rec. 128):

> "Rules, regulations and practices mean the rules, regulations and practices adopted by the Commission or by the railroads in conformity to the act or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from Subdivisions 11 and 14 of the same section and other portions of the statute. If therefore the order of the Commission had no other basis than the authority conferred to suspend rules, regulations and practices it would be without support."

In view of the reference made by the court to portions of the statute other than paragraphs (11) and (14) of Section 1, it seems not irrelevant to point out in this connection that although there are upwards of thirty-five instances in which one or more of the terms used in clause (a) occur in the Interstate Commerce Act, the words "rule" or "regulation" are never used to designate a statutory mandate, nor is the word "practice" ever applied to a course of conduct required by a statutory provision. In Section 13 reference is twice made to any "regulation or practice" made or imposed by the authority of a state or initiated by the President during federal control. In Sections 15 and 26, "laws or regulations applicable to transportation by water" are mentioned. In every other instance the terms "rule," "regulation" and "practice" clearly and unmistakably designate rules, regulations or practices established or to be established either by the carriers or by the Commission.

In order to fix the meaning of clause (a), however, it is unnecessary to go beyond the paragraphs of Section

1 relating specifically to car service which immediately precede it. Paragraph (11) provides that it shall be the duty of the carriers "to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service." Paragraph (13) authorizes the Commission to require the carriers to file with it and to incorporate in their rate schedules, their "rules, regulations and practices with respect to car service," and paragraph (14) authorizes the Commission to establish "reasonable rules, regulations and practices with respect to car service."

Paragraph (15) immediately follows, and it is plain that when clause (a) of that paragraph authorized the Commission to suspend "any or all rules, regulations or practices then established with respect to car services," it referred to the rules, regulations and practices specifically mentioned in the three paragraphs from which we have quoted and to nothing else.

This conclusion does not depend solely upon the inference that identical phrases have identical meanings, irresistible as that inference is in a case like the present. It is the only escape from a conclusion as to the legislative intention which is manifestly absurd. Paragraph (11) contains not only the requirement that the carriers shall establish rules and regulations with respect to car service, but the direct legislative mandate that they shall furnish safe and adequate car service. If the car shortage provision of paragraph (12) is a rule or regulation with respect to car service within the meaning of clause (a), so is this requirement of paragraph (11). Indeed the requirement of paragraph (11) that the carriers shall establish just and reasonable rules, regulations and practices is itself a statutory rule with respect to car service. In other words, counsel's claim that the Commission

was authorized by clause (a) to suspend the operation of the car shortage provision of paragraph (12) necessarily involves the conclusion that it is also authorized to suspend the operation of paragraph (11). It cannot seriously be argued that Congress intended to grant any such power, but the only alternative to holding that "any or all" statutory provisions relating to car service are subject to clause (a) is to hold that all are excluded from its operation.

3. Paragraph (15) should not be construed as confering power on the Commission to dispense with the car shortage provision of paragraph (12) or to establish another rule in its place, for the reason that if it is so construed, it involves an invalid delegation of legislative power.

The authority to deal with the car shortage provision of paragraph (12) which both counsel for defendant and the Court of Appeals attribute to the Commission is legislative in character, and if paragraph (15) is construed as conferring such authority, it is to that extent unconstitutional.

The extent to which the operation of a law, or the suspension of its operation, may be made to depend upon executive or administrative action was exhaustively considered in *Field* v. *Clark*, 143 U. S. 649. In that case the validity of a statute vesting in the President the power to issue a proclamation suspending the operation of certain provisions of a revenue act was questioned on the ground that it amounted to a delegation of legislative authority. In furtherance of the policy of reciprocity in trade with foreign countries the act in question provided for the introduction into the United States of certain articles of commerce without the payment of duty, but

in case any country from which such articles were exported to the United States should impose duties on imports from the United States which the President deemed reciprocally unequal and unreasonable, the statute provided that he should issue a proclamation suspending the operation of the provision permitting the free introduction of imports from that country, and prescribed the duties which should be levied during the period of the suspension.

In holding that this statute was not open to the objection that it delegated legislative power to the President, the court said (page 693):

> "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the third section, of course, implies that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. *As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named con-*

tingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

The line which the court draws in this case between the legislative discretion which may not be delegated, and the discretion which may be committed to an administrative body is clear and precise. The terms of the law, the conditions upon which its application depend—these are matters for legislative decision. The question whether the conditions upon which the legislature has made the application of the law depend do in fact exist may be left to the determination of another agency of government.

This distinction has been approved and adopted without question or qualification by the subsequent cases in which this question has arisen, and *Field* v. *Clark* may undoubtedly be regarded as having established the limits within which Congress may lawfully make the application of a statute depend upon administrative action.

See

Buttfield v. *Stranahan*, 192 U. S. 470, 496.
Union Bridge Co. v. *United States*, 204 U. S. 364.

That the authority to deal with the car shortage provision of paragraph (12), claimed for the Commission, transcends these limits is manifest. It does not depend upon a finding by the Commission of the existence of facts or circumstances designated by Congress as the con-

dition of its exercise. In substance and effect, it is a power to suspend the operation of the car shortage provision of paragraph (12) and to substitute a different rule whenever the Commission considers such action expedient.

It may be urged that the Commission is required to find the existence of an "emergency" before it can act under paragraph (15). But this is not the finding of a "particular fact" within the rule laid down by *Field* v. *Clark*. Any shortage of equipment is an emergency within the meaning of paragraph (15), if the Commission so considers it. This is the plain meaning of the statute, and, as we have shown, *infra*, pp. 105-106, it is the practical construction given to it by the Commission. A finding by the Commission that an emergency exists, as a preliminary to setting aside the car shortage provision of paragraph (12), is therefore nothing more nor less than a finding that the public interest requires it to be set aside. In other words, if that provision is held to be within the jurisdiction conferred on the Commission by paragraph (15), the effect is precisely as if Congress had expressly declared that its operation should be suspended whenever the Commission in its discretion should so determine.

This, however, is exactly the kind of discretion which, according to the doctrine of *Field* v. *Clark*, Congress must exercise itself and cannot delegate. To prescribe the facts and circumstances in which a law shall be applicable is as much the inalienable function of the legislature as to fix the terms of the law. Congress cannot frame a law and affix a penalty to its violation and then hand it over to a Commission to be enforced or not as that body may think fit.

Yet this is what counsel for defendant claim and the Court of Appeals holds that Congress has done.

The Court of Appeals, in disposing of the case at bar, refused to entertain the question here presented. It said (Pr. Rec., 130):

> "The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress in conferring the right could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff claiming the benefits of the statute cannot assert the unconstitutionality of its limitations. *Daniels* v. *Tearney*, 102 U. S. 415; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17."

As to this method of disposing of the constitutional question, we have to say:

First. The authorities cited by the court are based on the doctrine of equitable estoppel. In each case the party attacking the statute had received *at the expense of the opposing party* a benefit which it was obviously inequitable for him to retain unless he continued to be bound by the statute. No such situation exists in the case at bar. The defendant had no vested right in the assigned car practice, and the plaintiff's right to the benefit of the provisions of paragraph (12) was not obtained at the defendant's expense. The elements of an estoppel are wholly lacking.

Second. The court has completely ignored the fact that the principal importance of the constitutional question presented in this case is in its bearing upon the construction of the statute and not upon its validity. Our main contention is that the statute should not be construed as conferring on the Commission an uncontrolled discretionary authority over the operation of paragraph (12) for the reason that, so construed, it will be unconstitutional. It is no answer to this contention to assume,

as the court does, that the statute is unconstitutional in that particular and then assert that the plaintiff is estopped to attack it on that ground.

If, as we believe we have shown and as the Court of Appeals tacitly admits, Congress had no power to delegate to the Commission this discretionary authority, there is no possible reason for holding that it attempted to do so in paragraph (15). It is one of the most elementary rules of statutory construction that a statute must not be construed so as to render it unconstitutional if any other construction is reasonably possible, (*United States* v. *Delaware & Hudson Railway Company*, 213 U. S. 366, 407), and it cannot possibly be contended that the language of clause (d) so plainly expresses an intention to authorize the giving of directions inconsistent with paragraph (12), as to exclude any other interpretation.

Certainly nothing has been urged in support of the construction of clause (d) as conferring power to give directions inconsistent with paragraph (12) or of clause (a) as conferring power to suspend its operation, which is sufficiently compelling to override the presumption that Congress did not intend to transcend the constitutional restrictions upon its power. Both the Court of Appeals and the defendant agree that it would be highly expedient for the Commission to have authority over the application of paragraph (12). The defendant finds that clause (a) is sufficiently broad to accommodate such authority. The court rejects this view but finds clause (d) more hospitable.

This is the entire argument on the question of the construction of paragraph (15) by the advocates of the unlimited power of the Commission to deal with coal car distribution, and it is manifestly insufficient as against

the proposition that such a construction will make the statute unconstitutional. The absurdity of attributing to Congress an intention to violate the Constitution on grounds of expediency is patent, and it is a settled rule that general language in a statute must be read in the light of the Constitution and that however broad it may be, it cannot be construed as extending to matters beyond the constitutional power of the legislature.

McCullough v. *Virginia*, 172 U. S. 102, 112.

4. The purpose and intent of Congress with reference to the distribution of cars for the transportation of coal would be wholly defeated if paragraph (15) were construed as authorizing the Commission to suspend the operation of the car shortage provision of paragraph (12) or to give directions inconsistent with that provision.

The view that Congress intended paragraph (15) to authorize the Commission to give directions which would have the effect of suspending the car shortage provision of paragraph (12) not only finds no support in the language of the statute, but it is utterly inconsistent with the policy adopted by Congress in dealing with the distribution of coal cars as evidenced by the enactment of paragraph (12).

That Congress attached especial importance to the application of mine ratings during periods of car shortage is evident. The practices of the carriers in regard to the supply of cars to shippers obviously belong to the category of subjects which it has been the policy of Congress, since the creation of the Interstate Commerce Commission, to leave to the discretion of that body, subject only to the general prohibitions against undue preferences contained in Section 3 of the act. The mere fact

that Congress so radically departed from this policy as to enact a specific mandatory rule for the distribution of coal cars during periods of car shortage, is conclusive evidence that its attention had been sharply drawn to that particular subject.

Yet we are asked to believe that having thus unmistakably registered its view that the ratable distribution of coal cars was of such essential importance as to require enforcement by a statutory mandate backed by a specific and severe penalty, Congress proceeded to nullify that mandate by a later provision of the same statute, return to the Commission by paragraph (15) the jurisdiction it had withdrawn by paragraph (12), and for all practical purposes leave the question of coal car distribution exactly where it found it.

That this is the consequence of giving to paragraph (15) the construction placed on it by the Court of Appeals does not admit of doubt. The suggestion of that court that paragraph (12) was intended to provide for what it calls the "usual long existing car shortage," and that paragraph (15) was limited in its operation to shortage "so much beyond the usual as to constitute an emergency" has no basis in the language of the statute. Paragraph (15) expressly provides that "whenever the Commission is of the opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, the Commission shall have and is hereby given authority," etc. There is nothing said here about usual or unusual shortages. It is within the uncontrolled discretion of the Commission to determine that any shortage of equipment requires immediate action, and having so determined, to exercise the authority granted "either upon complaint or upon its own initiative without complaint * * * and with

or without notice, hearing, the making or filing of a report according as the Commission may determine." And the directions which it is thus authorized to give without complaint, notice or hearing are to remain in force "for such periods as it may determine."

We shall waste no time in discussing what may happen to the car distribution rule of paragraph (12) if it is held that the Commission has power under paragraph (15) to prescribe a different rule. Instead we invite the court's attention to what has actually happened since February 28, 1920, the effective date of both paragraphs.

On April 15, 1920, the notice which appears in this record and which substituted the assigned car practice for the rule of pro rata distribution prescribed by Congress in paragraph (12) was issued. This notice remained in force until September 28, 1920, when the Commission substituted a modified notice squarely in conflict with paragraph (12) and still authorizing the use of assigned cars for railway fuel. This modified notice was not revoked until March 24, 1921. During the period of more than eleven months covered by these two notices, the acute car shortage which brought about the original notice ran its course and disappeared, and after a period in the summer during which the usual surplus of coal cars existed, the regular seasonal shortage—for which, according to the Court of Appeals, paragraph (12) was intended to provide—began to develop, reached its maximum and in its turn disappeared.

In other words, within six weeks after Congress had legislated "to prevent the possibility of the recurrence of the evil of assigned cars," their use was resumed with the sanction and encouragement of the Commission, and continued uninterruptedly with all the concomitant and resulting evils which Congress had been so solicitous to

prevent, during all the stages of two successive car shortages.

This practical construction by the Commission of its powers under paragraph (15) is far more convincing and logical than the distinction attempted by the Court of Appeals between usual and unusual car shortages. In the view of the Commission, any coal car shortage whether local or general, whether it is in its mild early autumnal stage, in its acute midwinter stage, or moribund with the approach of spring, is an emergency which justifies the use of assigned cars, and if the distribution of coal cars during periods of shortage is within the scope of paragraph (15) at all, the Commission's opinion is conclusive.

But we submit that this view of paragraph (15) leaves Congress in an absurd position. If this was the result which it intended to reach, it might have done so quite as effectively and in a manner far more consistent with its dignity by refraining from the futile gesture which paragraph (12) has so far proved to be.

There may be room for two opposed opinions as to the wisdom of leaving the regulation of coal car distribution to the discretion of the Commission. But it is impossible to give a rational construction to the statute upon the theory that Congress entertained both of those opinions at the same time. That, however, is precisely what is involved in the construction of paragraph (15) upon which the Court of Appeals rested its decision of this case. We are required to believe that having pointedly withdrawn the question from the jurisdiction of the Commission by paragraph (12), Congress immediately provided in paragraph (15) that the Commission should have unlimited power to determine whether that withdrawal should have any effect.

III.

THE PLAINTIFF IS ENTITLED TO RELIEF IN EQUITY EITHER IN A STATE OR FEDERAL COURT AGAINST THE CONTINUED VIOLATION BY APPELLEE OF THE CAR SHORTAGE PROVISION OF PARAGRAPH (12) AND THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE TEMPORARY INJUNCTION AND ORDERING THE DISMISSAL OF THE BILL.

The bill of complaint in this case alleged the existence of a car shortage, and claimed that during its existence defendant was bound under paragraph (12) to distribute the available cars among the mines served by it, including the plaintiff's mine, on the basis of their ratings. It also alleged that the defendant had violated paragraph (12) by failing and refusing to furnish the plaintiff with its full ratable proportion of the available cars, and by furnishing other mines with more than their *pro rata* shares, and that it threatened and intended to continue this unlawful method of distribution and would do so unless restrained by injunction. The bill further alleged that plaintiff had suffered and would continue to suffer irreparable injury by reason of these unlawful acts of defendant, describing in detail the nature of such injuries, and that it had no adequate remedy at law in the premises.

The answer of the defendant denied none of the allegations of irreparable injury, but claimed that the matters alleged in the bill were within the jurisdiction of the Interstate Commerce Commission, that no application for relief had been made to the Commission, and set up the Commission's order of April 15, 1920, as justifying the practice complained of in the bill.

On the motion for the temporary injunction affidavits were filed on behalf of plaintiff supporting all the ma-

terial allegations of the bill and no counter affidavits were filed.

On this record we insist, *first*, that the bill stated a case for equitable relief which was within the jurisdiction of either a state or a federal court, and that the Court of Appeals erred in ordering its dismissal; *second*, that the temporary injunction was properly granted by the District Court and the Court of Appeals erred in reversing it.

1. The Court of Appeals erred in ordering the dismissal of the bill of complaint.

The allegations of the plaintiff's bill show a violation by the defendant of that portion of paragraph (12) Section 1 of the Interstate Commerce Act, which in express terms declares the law applicable to the distribution of coal cars during periods of car shortage, and a resulting injury to the plaintiff. It is well settled that in a case of this character the injured party is not bound to apply to the Interstate Commerce Commission for relief before commencing suit, but may maintain an action either in a state or a federal court without any application to the Commission.

Pennsylvania Railroad Company v. *International Coal Mining Company*, 230 U. S. 184.

Mitchell Coal and Coke Company v. *Pennsylvania Railroad Company*, 230 U. S. 247.

Pennsylvania Railroad Company v. *Puritan Coal Mining Company*, 237 U. S. 121.

Pennsylvania Railroad Company v. *Sonman Shaft Coal Company*, 242 U. S. 120.

Pennsylvania Railroad Company v. *Stineman Coal Mining Company*, 242 U. S. 298.

In *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, a suit was brought for damages suffered by reason of the payment of unlawful rebates by the defendant. The jurisdiction of the court was objected to on the ground that what was claimed to be a rebate was in fact merely a differential between the rates on free and contract coal, and that whether this distinction between free and contract coal was reasonable, was a question for the Commission to determine in the exercise of its administrative jurisdiction. On this point the court said (pages 196-197):

"None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, Sec. 2; March 2, 1889, 25 Stat. 855, c. 382, Sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) *The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute*, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discre-

> tion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. *The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class.* This departure from the published tariff was forbidden, and Sec. 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation, together with reasonable attorneys' fees.' "

This case was cited and its doctrine restated and approved in *Mitchell Coal Company* v. *Pennsylvania Railroad Company*, 230 U. S. 247, which also involved a claim for damages caused by a departure from the published tariff. The court said (p. 257):

> "There the carrier insisted that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice."

In *Pennsylvania Railroad Company* v. *Puritan Coal Company*, 237 U. S. 121, there was a writ of error to reverse a judgment of a state court for damages suffered by the plaintiff by reason of the defendant's failure to furnish it with the share of cars for the transportation of coal, to which the plaintiff was entitled under the car distribution rules of the defendant. The defendant objected to the jurisdiction of the state court on the ground, *first*, that the question involved was one which called for the exercise of the administrative power of the Commission, and, *second*, that the suit was one for damages for unjust discrimination and could not be brought except in a court of the United States. The court summed up its position on these questions in the following language (page 131):

> "There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Sec. 9.
>
> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occa-

sioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts."

The same question was discussed later in *Pennsylvania Railroad Company* v. *Sonman Shaft Coal Company*, 242 U. S. 120, which also involved a judgment of a state court for damages suffered by reason of a failure to furnish cars for transportation of coal. The court said (pages 123-124):

"It is true that Sections 8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that Sections 8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for Section 22 contains this important provision. 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by reading them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision in Section 22 is to make it plain that such 'appropriate common law or statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced (*Texas & Pacific Ry. Co.*

v. *Abilene Cotton Oil Co.* 204 U. S. 426, 446-7); that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R. R. Co.* v. *Puritan Coal Co.* 237 U. S. 121, 129; that *the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission,* or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, ibid. 130; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim may be prosecuted in either a federal or a state court without any precedent action by the Commission, *ibid.* 131-132; and that, *if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a federal or a state court without any preliminary finding by the Commission, and this whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of* 1906 *or of the duty prescribed by the act, ibid.* 132-135; *Eastern Ry. Co.* v. *Littlefield,* 237 U. S. 140, 143; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.* 238 U. S. 275, 283; *Pennsylvania R. R. Co.* v. *Clark Coal Co.* 238 U. S. 456, 472."

It will be observed that the decision in all of these cases turns on the question whether the case involves an exercise of the administrative discretion of the Commission. If the damages are alleged to be the result of an unjustly or unreasonably discriminatory practice, the

courts will not entertain the claim, since it has been established that the Commission has exclusive original jurisdiction to pass on the question whether a practice is open to the charge of being unreasonably discriminatory. But if the wrongful act complained of is a violation of a specific prohibition of the statute not involving the standard of reasonableness, so that the courts may determine the issue presented without invading the administrative province of the Commission, either a state or a federal court has jurisdiction.

This distinction is aptly illustrated by the provision of the act in question in this case. Paragraph (12) requires the carriers "to maintain and apply just and reasonable ratings" of the mines served by it. Clearly if a shipper complains that the rating of his mine does not comply with the statutory requirement that it shall be just and reasonable, the claim presents an administrative question. The courts will not undertake to determine the justice or reasonableness of the rating, and for a decision on that point the shipper must apply to the Commission. But if there is no complaint of the rating, and the sole question is whether the carrier has applied it as the statute requires, there is no occasion for the exercise of administrative discretion, and the courts will accept jurisdiction without requiring a precedent application to the Commission.

In the case at bar no question is raised as to the justice or reasonableness of the ratings established by defendant. The sole complaint is that the defendant does not apply the ratings in the distribution of the available car supply, and its car distribution rules are attacked, not on the ground that they are unjustly discriminatory, but because they do not comply with the statutory requirement as to the application of the ratings and the counting

of cars, and provide a different method of distribution, thus purporting to authorize an act specifically prohibited by paragraph (12). The determination of the issue thus presented neither requires nor permits the exercise of administrative discretion.

We do not understand that the proposition of law here stated is seriously controverted. The contention of defendant is that it is not applicable to this case, *first*, because paragraph (12) does not require the distribution of cars in accordance with mine ratings, and *second*, because even if it does, paragraph (15) authorizes the Commission to dispense with the requirement of paragraph (12) and prescribe a different rule, and the notice of April 15, 1920, was a valid exercise of that authority.

We believe that what has been said upon this question under Point I of this argument (*supra*, pp. 30-62) demonstrates that the first of these contentions cannot be sustained. It follows that, if paragraph (12) controlled the distribution of cars during the car shortage involved in this case, the claim set up in the answer that the subject matter of this bill was within the administrative jurisdiction of the Commission is untenable, and the suit was properly brought in the Circuit Court of Marion County, West Virginia.

The second contention,—namely, that the notice of April 15, 1920, and not paragraph (12) was the controlling rule, was the basis of the decision of the Court of Appeals. Under Point II of this argument (*supra*, pp. 62-106) we have stated the considerations which, as we believe, lead inevitably to the conclusion that the Commission was wholly without authority to issue this notice. If this conclusion is sound, the action of the Commission clearly could not affect the plaintiff's substantive right to a *pro rata* distribu-

tion of cars as prescribed by paragraph (12) or oust the jurisdiction of the courts to adjudicate that right.

On this point the following language from the opinion of the court in *Pennsylvania Railroad Company* v. *International Coal Company*, 230 U. S. 184, 197, is pertinent:

> "In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. *It could not have been legalized by any proof, nor could the Commission by any order have made it valid.* The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class."

No other grounds have been urged for the dismissal of the bill. Neither in the motion to dismiss, nor in the answer, nor in argument in the District Court or the Court of Appeals was it suggested that the allegations of the bill as to irreparable injury and the lack of an adequate remedy at law were not sufficient to warrant the appellant in proceeding by a bill for an injunction rather than by an action at law for damages, and we apprehend that this question cannot properly be raised for the first time in this court.

Reynes v. *Dumont*, 130 U. S. 354.

Brown v. *Lake Superior Iron Company*, 134 U. S. 530.

Detroit v. *Detroit Citizens' Street Railway Company*, 184 U. S. 368.

In any event, the allegations upon which the appellant bases its claim to equitable as distinguished from legal relief, amply support the claim.

The bill shows that the effect of the decrease in car supply due to the plaintiff's failure to receive its full share of cars, is not only to reduce the amount of coal which it is able to produce and sell and thus directly impair the profits of its business, but to impair its credit and injure the good will of its business by decreasing its ability to supply the requirements of its customers and to fulfill its contracts and by making it necessary to charge an increased price for its coal to absorb the increase in the per ton cost of production which accompanies decreased car supply; that plaintiff loses its more efficient laborers to mines which can offer more regular employment because they receive a preferred car supply, and that those who remain are less loyal and assiduous than they would be if they were enabled to work more steadily; that while defendant suffers these disadvantages, its favored competitors are enabled to keep up production, restrict their unit production cost, maintain and increase the efficiency of their organizations and otherwise gain marked advantages over plaintiff.

It is also alleged that the plaintiff's only remedy at law would be by repeated suits for damages which would involve a multiplicity of suits and great and burdensome expense, and that the injury to its business and good will and the progressively increasing demoralization of its organization cannot be adequately compensated by damages.

All of these allegations are admitted by the motion to dismiss, and we submit that they fully justify the plaintiff's prayer for an injunction.

2. The temporary injunction was properly granted by the District Court and the Court of Appeals erred in reversing it.

The plaintiff's motion for an injunction *pendente lite* was supported by the sworn bill of complaint and by eight affidavits. (Pr. Rec., 6-25, 55-83.) The affidavits sustained all the material allegations of the bill, and the proofs therefore established the fact that the practice of the defendant in car distribution was, at the time of the hearing of the motion causing all the injuries described in the bill, and that their effect upon the property and business of the plaintiff was cumulative, having an increasing tendency to destroy and demoralize it.

No counter affidavits were filed, and if the court had power to grant a temporary injunction, it cannot be contended that the showing made was not sufficient to warrant the exercise of that power. This was in effect admitted both in the District Court and in the Court of Appeals. The only grounds upon which the granting of the injunction was opposed in the District Court or its reversal sought in the Court of Appeals were that the District Court was without jurisdiction of the cause, and that, even if it had jurisdiction, no interlocutory injunction could be granted except after a hearing by three judges, one of whom must be a circuit judge.

We have already sufficiently discussed the first of these objections. The second was of course based on that portion of the Act of October 22, 1913, which provides that "no interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United

States, or by any judge thereof or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge and shall be heard or determined by three judges, of whom at least one shall be a circuit judge," etc.

The Court of Appeals seems to have been under the impression that although the injunction in the case at bar did not mention any order of the Commission, and was directed solely against violations of the statutory car distribution rule of paragraph (12), it was nevertheless within the provision above quoted for the reason that its issuance could not be justified unless the Commission's notice of April 15, 1920, was held void.

This impression is clearly erroneous. The statute refers to an application for an injunction operating directly upon an order of the Commission which, if it were not set aside, or suspended by judicial decree would have some legal operation or effect. The application for the injunction and the injunction in the case at bar were based on the theory that the Commission's notice of April 15, 1920, was void and wholly without legal effect, and that there was therefore no occasion for setting it aside. If, as we contend, the Commission had absolutely no authority to relieve the carriers of the obligation to conform to the car shortage provision of paragraph (12), this theory is manifestly sound. The Commission's notice of April 15, 1920, could not affect the plaintiff's statutory right or impair or alter its remedy. The court was not called upon to set aside an order of the Commission or suspend its operation, but merely to enforce a clear statutory right.

IV.

THIS COURT HAS JURISDICTION OF THE APPEAL FROM THE DECREE OF THE CIRCUIT COURT OF APPEALS.

The case at bar came to the Circuit Court of Appeals on appeal from the order of the District Court granting the interlocutory injunction. That court, being of the opinion that the Interstate Commerce Commission's order of April 15, 1920, was a complete bar to the relief prayed by the bill, followed the practice approved in *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, and other cases, and not only reversed the injunction order but directed the dismissal of the bill. This decree is not made final in the Circuit Court of Appeals by the provisions of the Judicial Code, and as the matter in controversy exceeds one thousand dollars exclusive of costs (Pr. Rec. 38) the case is appealable to this court by the terms of Section 241 of that title.

By Section 128 of the Judicial Code the judgments and decrees of the Circuit Court of Appeals are made final in that court only in cases arising under the patent, trademark, copyright, revenue and criminal laws, and in cases in which Federal jurisdiction is dependent solely on diverse citizenship of the parties.

The case at bar does not fall within any of these classes. The petition for removal upon which the case was removed to the District Court alleges the existence of diverse citizenship as a ground for removal, but it also alleges another ground, in itself sufficient to sustain the jurisdiction of the District Court, namely, that the case necessarily involves the construction of the Act to Regulate Commerce as amended, and the Transportation Act, 1920, and especially of paragraphs 10 to 17 inclusive of Section 402 of the latter act (Pr. Rec. 38-39). It also appears by the bill that the suit requires the construction of paragraph (12) Section 1 of the Interstate Commerce Act, which is identical with paragraph (12) Section 402

of the Transportation Act referred to in the petition for removal.

The jurisdiction of the District Court therefore did not depend on diverse citizenship alone since jurisdiction would have attached regardless of the citizenship of the parties, by reason of the existence of a question arising under the laws of the United States, and as that question does not arise under any of the laws specifically enumerated in Section 128 the decision of the case by the Circuit Court of Appeals is not made final in that court by this section. It is therefore within the express provision of Section 241, which provides for an appeal to this court from any decree of the Circuit Court of Appeals not made final in that court by the provisions of the Judicial Code, when the matter in controversy exceeds one thousand dollars besides costs.

Northern Pacific Railroad Company v. *Amato*, 144 U. S. 465.

Spreckels Sugar Refining Company v. *McClain*, 192 U. S. 397.

Louisville & Nashville Railroad Company v. *Cook Brewing Company*, 223 U. S. 70.

United States Fidelity and Guaranty Company v. *Bray*, 225 U. S. 205.

United States Fidelity and Guaranty Company v. *Bray*, *supra*, presented a situation precisely analogous to that in the case at bar, except that in the Bray case the suit originated in a Federal Court whereas in the case at bar the jurisdiction of the Federal Court was acquired through removal proceedings. In the Bray case the court said, in denying a motion to dismiss the appeal (page 214):

"In the Federal Courts an appeal, as a general rule, lies only from a final decree. But Sec. 7 of the Act of March 3, 1891, 26 Stat. 826, c. 517, as amended April 14, 1906, 34 Stat. 116, c. 1627, establishes an exception by providing for an appeal to the Circuit Court of Appeals from an interlocutory decree

granting or continuing an injunction or appointing a receiver. It was under this section that the appeal to that court was taken, and on that appeal the court was authorized to review the whole of the interlocutory decree, not merely the part granting the injunction, and also to determine whether there was any insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and, if there was, to direct a final decree dismissing the bill. *Smith* v. *Vulcan Iron Works,* 165 U. S. 518; *In re Tampa Suburban Railroad Co.* 168 U. S. 583; *Mast, Foos & Co.* v. *Stover Manufacturing Co.* 177 U. S. 485; *Ex parte National Enameling Co.,* 201 U. S. 156. In the exercise of this authority the Circuit Court of Appeals reached the conclusion that the suit could not be maintained in the Circuit Court, and directed both that the injunction be dissolved and that the bill be dismissed. That was a final decree, and as the jurisdiction of the Circuit Court had been invoked not solely upon the ground of diverse citizenship, but also upon the ground that the suit was one arising under the act of Congress whereunder the bonds upon which the complainant was surety were given, a further appeal to this court was rightly allowed under Sec. 6 of the act of March 3, 1891, *supra,* the amount in controversy being in excess of $1,000, exclusive of costs. *Henningsen* v. *United States Fidelity and Guaranty Co.* 208 U. S. 404; *Howard* v. *United States,* 184 U. S. 676, 680."

The fact that the case at bar came to the United States District Court by removal does not distinguish it from the *Bray* case so far as the point here involved is concerned (see *Louisville & Nashville Railroad Company* v. *Cook Brewing Company,* 223 U. S. 70), and it is therefore submitted that the statement of the law above quoted conclusively establishes the jurisdiction of this appeal.

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CLERK

IN THE

Supreme Court of the United States

October Term, 1921

No. 153.

LAMBERT RUN COAL COMPANY,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit

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BRIEF FOR APPELLEE

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IN THE

Supreme Court of the United States

October Term, 1921

LAMBERT RUN COAL COMPANY,
Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellee.

No. 153.

STATEMENT.

Lambert Run Coal Company, a West Virginia corporation, filed against the Baltimore and Ohio Railroad Company, a Maryland corporation, in the Circuit Court of Marion County, West Virginia, (Rec. 5) a bill in chancery which prayed that the defendant railroad be enjoined, during any period of shortage of coal cars, (Rec. 23) "from distributing to any of the mines served by it more cars than the said mines are entitled to under the maintenance and application of their respective mine ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine," and also from continuing the enforcement of its coal car distribution rules 8, 9, and 10 (Rec. 34). Upon

petition of the Railroad Company (Rec. 37) alleging, among other things, diverse citizenship and principally that the bill involved the construction of certain laws of the United States, particularly the Act to Regulate Commerce, approved February 4, 1887, as amended, and more especially the amendments thereto of the Transportation Act, 1920, (Rec. 38-39) the bill was removed to the District Court of the United States for the Northern District of West Virginia (Rec. 54). The Railroad Company then filed a Motion to Dismiss and Answer (Rec. 84) setting up as its principal reasons why the bill should be dismissed (1) that the Coal Company had not stated the most material facts necessary to a determination of the case, (2) that no action would lie until the matter had been passed upon by the Interstate Commerce Commission, and, (3) that the parts of the Rules complained of were made under the direction of the Commission's emergency order of April 15, 1920, issued by virtue of the power conferred on the Commission by paragraph 15 of Section 1 of the Interstate Commerce Act, and did not contravene Paragraph (12), of Section 1, of the Act.

The case was heard on motion for an injunction by one District Judge, the defendant's objection that it could be heard only by three judges, one of whom should be a circuit judge, under the District Court Jurisdiction Act, being overruled, and an order was issued (Rec. 107) enjoining the defendant Railroad Company from adopting or enforcing any distribution of cars to mines for the transportation of coal in an amount the ratio of which to the rated capacity of the mines "is greater or less than or different from the ratio of the total number of cars available on defendant's line for the transporta-

tion of coal to the total rated capacity of all mines served by defendants." (Rec. 100).

From this injunction order an appeal was taken (Rec. 110) to the Circuit Court of Appeals for the Fourth Circuit by the Railroad Company, there being thirty-seven assignments of error. Principally the errors assigned were:—first, that the District Court erred in hearing and determining the application for an injunction in the absence of three judges, of whom at least one should be a Circuit Judge, and in not holding that the cause was one brought to enjoin, set aside, annul, or suspend in whole or in part, an order of the Interstate Commerce Commission; and second, that the District Court erred in not holding that the practice sought to be enjoined was expressly authorized by a certain order of the Interstate Commerce Commission made April 15, 1920, and which said order, it was contended, was and is within the jurisdiction and authority of said Commission under and by virtue of paragraphs Nos. (10), (11), (12), (13), (14), (15), (16), and (17) of Section 1 of the Interstate Commerce Act (Rec. 111-113). This latter contention the Circuit Court of Appeals sustained, (Rec. 129-130) and entered a decree dissolving the injunction and dismissing the bill, (Rec. 131) but specifically holding, nevertheless, that the practices complained of "are not in accord with sub-division (12) of the Transportation Act of 1920, standing alone." (Rec. 128). The Court also undertook to define what constitutes an 'emergency,' as that word is used in paragraph 15 of Section 1 of the Interstate Commerce Act, to the effect that it was a car shortage so much beyond the usual as to constitute an emergency, and not merely "the usual long existing car shortage." (Rec. 129). The Court further said that the

injunction was improperly granted because the Court did not call to its assistance two other judges, as required by the District Court Jurisdiction Act.

The proceeding now comes before this Honorable Court on the appeal of Lambert Run Coal Company (Rec. 132) which assigns eleven errors on the part of the Circuit Court of Appeals, (Rec. 133) all of which may be summarized as raising the following questions:

1. Is the cause one originally brought to enjoin an order of the Interstate Commerce Commission, and therefore one wherein the injunction was improperly granted because the District Court did not call to its assistance two other judges, in accordance with the District Court Jurisdiction Act?

2. Was it the intent of Congress in enacting paragraph No. (12) of Section 1 of the Interstate Commerce Act to make the "assigned car rule" of the Interstate Commerce Commission, a rule of statute?

3. Does paragraph No. (15) of Section 1 of the Interstate Commerce Act vest in the Interstate Commerce Commission the power to suspend the operation of coal car distribution rules established in pursuance of said paragraph No. (12) whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country?

4. Was a certain order made by the Interstate Commerce Commission April 15, 1920 a valid exercise of the authority conferred upon it by said paragraph No. (15) of the Interstate Commerce Act, and was such order reviewable by the Court?

The pertinent portions of the Interstate Commerce Act, the Interstate Commerce Commission's notice of March 2, 1920, relative to coal car distribution, and the order of the Commission, dated April 15, 1920, are set out in the margin below: *

* Interstate Commerce Act, Section 1.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing or a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such times as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify,

This entire controversy involves the present legal status of what is commonly known in the regulation of interstate commerce as the "assigned car rule,"—a rule originally laid down by the Interstate Commerce Commission in 1907 to govern certain phases of the distribution of cars to mines for loading with coal.

Car Distribution to Coal Mines:—Car distribution rules are obviously a simple matter when the railroad has more than enough cars to meet all requirements of

change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

Interstate Commerce Commission Notice to Carriers and Shippers, March 2, 1920. (Rec. 106).

"The supply of cars available for the transportation of coal is insufficient to meet the demand. Unusual movements incident upon the strike of coal miners has brought about an abnormal location of cars. It is desirable that the proper relocation of cars shall be brought about as rapidly and with as little confusion as is possible. Critical situations still exist in which fuel for essential industries and purposes must be provided. The railroads and the coal operators have all been working under the uniform mine rating and car distribution rules established by the Railroad Administration and those rules seem to be generally satisfactory and to meet with general approval.

To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

GEORGE B. McGINTY, *Secretary.*"

Interstate Commerce Commission Notice to Carriers and Shippers, April 15, 1920. (Rec. 105.)

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in

its shippers. When, however, there is a general car shortage, there must be some equitable basis or system upon which such equipment as is available is divided between shippers, and with respect to bituminous coal mines as a class of shippers, the rules governing during the pendency of this controversy are set out in the record at pages 27-34. Briefly, under these rules an hourly capacity for producing coal is determined from the previous month's performance; this, in tons, is translated into daily capacity by multiplying by the established number of hours in the working day; and this product, divided by 50 as the capacity of the accepted standard coal car gives, in cars, the basic figure denominated the "daily rating" or the "rated capacity," of the mine. This ascertained in identical manner for all mines, then

order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Tracr* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act, as amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. McGINTY,
Secretary.

becomes the basis of car distribution to such mines in car shortage, or what are sometimes termed percentage periods.

The present day uniform scheme of mine rating and car distribution is an evolution of some years. It had its culmination during the war period when it received the attention of the Fuel and Railroad Administrations, and was published as a uniform arrangement by the latter (Rec. 47-48). Its previous history is to be found in numerous reports of the Interstate Commerce Commission, of which particular reference may be made to:

R. R. Com. of Ohio et al. v. *H. V. Ry. Co.*, 12 I. C. C. 398.

Powhatan Coal & Coke Co. v. *N. & W. Ry. Co. et al.*, 13 I. C. C. 69.

Royal Coal & Coke Co. et al., v. *Southern Ry. Co.* 13 I. C. C. 440.

Traer v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C. 451.

Rail & River Coal Co. v. *B. & O. R. R. Co.*, 14 I. C. C. 86.

Hillsdale Coal & Coke Co. v. *P. R. R. Co.*, 19 I. C. C. 356.

In re Irregularities in Mine Ratings, 25 I. C. C. 286.

In all the rules of the carriers, in these various reports of the Commission, and in the uniform rules set out in the record at pages 27-35, there is a distinction recognized between assigned and non-assigned cars in the distribution scheme. In the former class there have always been included the cars of private ownership, and the cars of railroad ownership assigned or consigned to

certain mines for the loading of railroad fuel coal of the owning railroad. There are some roads which obtain all their fuel coal from mines located on their own rails. Others obtain part from such local mines, and the balance from mines located on foreign rails. There are some of the more important roads in the country, those of New England being a group of this class, all of whose fuel coal must come from mines located on other railroads, there being no coal tributary to their own lines. While most of the fuel coal moving to non-coal-producing railroads moves all-rail, there is considerable that moves rail-and-ocean and rail-and-lake.

Railroads secure their fuel coal supplies under varying methods. In some cases roads own and operate the mines from which a considerable proportion of their fuel coal is obtained, and in other instances their operation of mines is under lease. Again, some roads purchase the entire output of certain mines, and in other cases only a portion of the output. (Rec. 97-98). Bearing in mind the changing conditions of transportation and coal mining, particularly as affected by the making of new contracts for railway fuel supply year after year, it seems highly desirable that the regulating body should have a margin of flexibility and safety in dealing with the roads and the shippers of this important tonnage commodity.

History of the Assigned Car Rule:—Prior to 1907 it was a common practice for the railroads to deliver to coal mines cars privately owned or leased, foreign railway fuel cars, and cars for the carrier's own fuel loading, accordingly as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal, and to refrain from counting or charging such

cars against the distributive shares of the mines to which they were given (Rec. 96). Few of the roads then counted against the mine ratings, and against the mine's distributive share of empty cars, company fuel cars (i. e. cars to be loaded with the carrier's own fuel), private cars (i. e. cars owned or leased by coal companies), or foreign consigned cars (i. e. cars delivered by foreign roads for loading their own fuel coal at particular mines). (Rec. 99). All such cars were given to the mines for which they were intended and such mines were given in addition their full share of the other cars available for distribution (Rec. 96). This practice was complained of as unreasonable and unduly prejudicial, and in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra* decided July 11, 1907, the Commission held that privately owned or leased cars, and foreign railway fuel cars sent on to the line by other railway companies for loading with fuel coal for the use of such other railway companies, should be given to the mines to which they were consigned or assigned but must be counted against the distributive shares of the mines, and that if such specially consigned or assigned cars equalled or exceeded the distributive share of a mine receiving them it should have no additional cars, and if the specially consigned or assigned cars did not equal the distributive share of the mine to which given it should be given additional cars only sufficient to make up its distributive share. (Rec. 96). In *Traer* v. *Chicago & Alton R. R. Co., et al., supra* decided April 13, 1908, the same questions were presented that had been presented in *R. R. Com. of Ohio, et al.* v. *H. V. Ry. Co., supra,* and the additional question of the reasonableness of the carrier's failing to count against the mine to which they were delivered cars for loading with its own railroad fuel. The Commission fol-

lowed the decision in *R. R. Com. of Ohio, et al.* v. *H. V. Ry. Co., supra,* and in addition, held that the cars used by carriers on their own lines for transportation of their own fuel supply may be given to the mine or mines from which such fuel supply is received, but that if such mine or mines also ship commercial coal, the fuel cars so supplied must be counted against the mine or mines under the rule laid down in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra.* (Rec. 97).

The same general question came before the Interstate Commerce Commission in a number of other cases within the next few years, and the rule originally laid down was invariably followed. Thus, in *Royal Coal & Coke Co., et al.* v. *Southern Ry. Co., supra,* at page 448, the Commission said:

> "The carrier must be free to contract for the total output of a mine, if it so desires; or it may contract for any part of a mine's output less than the whole, and it is entitled to get its fuel coal first, for without fuel it can not haul even commercial coal to its destination, to say nothing of complying with its obligations to the public at large; but in all its acts it must deal even handed justice in the matter of car distribution as in the matter of rates. If a mine contracts to furnish only a part of its output to the railroad for fuel, and if the filling of its contract with the railroad calls for its full pro rata of cars, or more, then it should not receive other cars for commercial shipments. If such a mine in filling its contract to supply fuel coal to the railroad does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars."

Again, shortly thereafter, in further consideration of the same problem in *Rail & River Coal Co.* v. *B. & O. R. R. Co., supra,* the Commission, discussing *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra,* at page 92, said:

> "The principle clearly announced in the case referred to, both with respect to the so-called private cars and the so-called foreign railway fuel cars, is that while a carrier, during percentage periods, may not assign the private cars to operators other than their owners, and may not assign foreign railway fuel cars to any mines except those to which they have been manifested by the foreign line, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belong or the foreign railway fuel cars have been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine do not fill out its distributive share of available cars, enough system cars are to be added to make up its share according to its rating."

In *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.,* 215 U. S. 453, decided January 10, 1910, the Supreme Court of the United States sustained the decision of the Commission in *R. R. Com. of Ohio, et al.* v. *H. V. Ry. Co., supra,* and in *Traer* v. *Chicago & Atlon Railroad Co, supra,* and held that the act to regulate commerce delegated to the Commission authority to determine on complaint the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage as a means of prohibiting undue preference and unjust discriminations (Rec. 98). Following this decision by this Honorable Court, the Commission in *Hillsdale Coal & Coke Co.* v. *P. R. R. Co., supra,* reaffirmed its assigned

car rule as a just and reasonable rule, saying at pages 357-358:

> "The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio* v. *H. V. Ry. Co.*, 12 I. C. C. Rep., 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned, and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars."

Again, in the same case, at page 364, it was said:—

> "We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line

> also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced, *Interstate Com. Com.* v. *Ill. Cent. R. R. Co., supra,* the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds."

And, answering the contention of the railroad that its own more liberal rule was necessary to protect private car owners' rights, the Commission further said at page 370:

> ". . . in none of its decisions relating to coal car distribution has the Commission undertaken to forbid the use of private cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive if dependent solely on its share of system cars. On the contrary, the Commission has not only recognized the right of the carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators."

Explaining, in answer to a Resolution of the United States Senate in 1920, why this assigned car rule was then still effective (Rec. 97), the Commission said:

> ". . . if a contract for fuel covers such supply

> as the carrier reasonably needs for its current operation and a period of car shortage should come it could use its equipment to procure its fuel even though it thereby deprived shippers of desired use thereof: that this right to so use its cars did not rest upon the ground of private contract but upon the public necessity that the railroad must have fuel; but that neither contract nor consideration of public policy which recognize the public necessity for fuel would justify the carrier during a period of car shortage in using its equipment for a superfluous supply of its own fuel when such equipment was demanded and needed by the shippers and public."

Thus it will be seen that the rule so established by the Interstate Commerce Commission and sustained by this Honorable Court, expressly provided that all assigned cars, whether cars for company fuel loading, cars for foreign railway fuel loading, or privately owned or leased cars, must be placed in accordance with the assignment or consignment at the mines to which assigned or consigned, even though in excess of the distributive share of cars to which such mines were entitled; provided, however, that such cars must be counted against the distributive share of the mine receiving them, and that where the cars so placed equalled or exceeded the distributive share to which the mine was entitled on that day, no unassigned cars should be placed at the mine in addition to the assigned cars; but, that where the assigned cars placed at the mine did not equal the number of cars to which the mine was entitled as its distributive share for the day sufficient unassigned cars should be placed at the mine to make the total placements for that day equal to its distributive share. (See Rec. 11, Paragraph 7).

The rule of law on this subject which had by 1910 thus

been established remained the controlling rule for carriers generally, and apparently without friction or controversy for many years. During the world war, and under the rules of the Fuel Administration, including its bituminous coal zoning system, and while the roads were under Federal control, the use of assigned cars for loading railroad fuel was abandoned (Rec. 100). This arrangement was an incident of the war-time control of fuel and mine labor exercised by the President through the Fuel Administration (Rec. 12-13). The rule, however, remained in effect, and throughout the period of Federal control of railroads private cars were placed for loading in accordance therewith on an assigned basis. At the same time that the assignment of cars for railroad fuel loading was abandoned, the government price of bituminous coal was reduced ten cents per ton in all districts throughout the United States (Rec. 12), and arrangements were made by the Fuel Administration and the Railroad Administration whereby requisite supplies of fuel coal were guaranteed by the Fuel Administration to the railroads without the assignment of cars for that particular loading. This understanding and arrangement was embodied in advices given to the railroads of the change in practice July 1, 1918, to the roads in the east, and July 6, 1918, to the roads in the south and west, the Fuel Administration in each instance being advised that the former practice had been abandoned and the new arrangement instituted. (Rec. 13-17).

The particular point to be noted in connection with this war-time abandonment of the assigned car rule for railroad fuel cars is that the rule was not even to this partial extent abandoned until, more than a month after the original understanding between the Fuel and Railroad Administrations, definite and positive arrange-

ments were made whereby the railroads were guaranteed their requisite fuel supplies by the Fuel Administration. That guarantee rested upon the Fuel Administration's control of coal distribution and an explicit understanding between it and the Railroad Administration (Rec. 14-17). It was after the Fuel Administration had ceased to function and its guarantees were accordingly no longer effective, that the railroads, still under Federal control, and abiding by the decree of the President abolishing assigned cars for railroad fuel (Rec. 12-13) were compelled to resort to confiscation of coal in transit in order to keep their roads in operation (Rec. 100). In many instances the coal was confiscated at the mouth of the mine. Those familiar with these subjects are apparently unanimous in saying that the practice of confiscation is attended by more evils than is the practice of assigned cars for railway fuel (Rec. 100). For an elucidation of the reasons supporting this view as to the undesirability of confiscation, reference may be had to *Corona Coal Co.* v. *Southern Ry. Co.,* 266 Fed. Rep. 726 at 727-728.

According to the United States Geological Survey the steam railroads of the United States consume between 27 and 28 per cent of this country's annual production of bituminous coal. Regardless of how this coal is loaded,—whether in assigned or non-assigned cars,—that amount is required and must be had currently, the year round. At least the same number of cars will be needed for its transportation on a non-assigned basis as on an assigned basis, and the loss of concentrated handling and effort in the use of non-assigned cars at a larger number of loading mines may well require more cars. In any event, the use of non-assigned cars for railroad fuel coal will not make *even one* more car avail-

able for ordinary commercial coal, and obviously the latter will fail of transportation if the railroad's requirements are not currently furnished. This contingency the assigned car prevents; without the assigned car and with no power existing to compel shipment on railroad contracts, there is but one avenue open to the carrier when voluntary shipments fail in a high market, car shortage period,—confiscation, with its attendant evils above referred to. For the railroads must run. Other vital industry may, if it deems it wise, protect its needs with private cars as is later on shown (*post*, p. 32-33) but if the railroad's assigned car is not the railroad's private car, then the railroad, most vital of all industry, has no protection for its fuel coal supply. This is the true interest of the public in this proceeding.

When federal control of railroads terminated on February 29, 1920, there was in effect on all railroads under federal control the uniform coal car distribution rules that had been formulated by the Railroad Administration after consultation with a committee of the National Coal Association. In order that there might not be confusion because of different lines of action being followed by different individual roads, the Interstate Commerce Commission on March 2, 1920, issued a notice to carriers and shippers (*ante*, p. 6) recommending that until experience and study demonstrated that other rules would be more effective and beneficial, the uniform rules as contained in Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect. (Rec. 100).

This action of the Interstate Commerce Commission was taken the day after the Transportation Act, 1920, became effective. At this time some railroads which did not have more than two or three days' supply of coal,

and for some time had been securing their necessary fuel supply by confiscation at the mouth of the mine were being sued for damages on account of such confiscation. Injunctions were being sought in State courts against the practice of confiscation, and when it was learned that the carriers were contemplating return to the use of assigned cars, injunctions were sought in the State courts againts the same carriers restraining them from using assigned cars. Numerous informal conferences were had between the Commission and representatives of the coal operators and representatives of the railroads in an effort to find some way by which the carriers could be assured of a fuel supply without the use of assigned cars or resort to confiscation. A conference was arranged between a committee representing the railroads and a committee representing the National Coal Association for the purpose of devising, if possible, some plan that would effect that purpose but no concrete or definite suggestion to that end resulted. Transportation conditions in the country were serious. Railroads that were unable to meet the demands upon them for transportation would be wholly unable to function if they could not secure coal and many of them had not more than two or three days' supply (Rec. 100-101).

It was only after these various endeavors had failed to meet the situation that the Interstate Commerce Commission issued its order of April 15, 1920, already set out (*ante*, p. 6). The effect of this order was to reinstate the railroad fuel car in its place in the assigned car rule which had remained in effect and continued to govern private coal car distribution during Federal control. This was the situation, therefore, that resulted in the commencement of the proceedings that have now come before this Honorable Court.

ARGUMENT.

1. The original bill of complaint attacked a rule established by the Interstate Commerce Commission's direction of April 15, 1920, which was mandatory upon the carriers, and as such was in the nature of an order of the Commission, and therefore could be enjoined only by three judges, one of them a Circuit Judge, after notice to the Commission and to the Attorney General; or, as the only alternative, the bill attacked the reasonableness of a carrier's rule of car distribution to coal mines, and, thus raised an administrative question, original jurisdiction of which is solely within the Commission.

The correctness of this proposition is conceded by the Circuit Court of Appeals (Rec. 130). The direction, was to be sure, embodied in a "Notice to Carriers and Shippers," but its mandate is clear in the language reading:

> "The Commission * * * hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission."

Clearly the issue of such a direction is within the emergency power of the fifteenth paragraph of the first section, and when issued its effect, so far as the carrier is concerned, is identical with the effect of an order. There would therefore appear to be no room in our scheme of interstate commerce regulation, for any distinction between a direction and an order of the Commission in any consideration of the effect thereon of the District Court Jurisdiction Act of October 22, 1913, Compiled Statutes, Section 998.

If, however, the Commission's direction, embodied in the notice of April 15, 1920, can not be regarded as an order of the Commission, then, it is respectfully submitted the cause was not properly justiciable by either the single District Judge or by three judges. For the issue would then be the reasonableness of the defendant railroad's rule, and this, as an administrative question, would be exclusively one for the Commission. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *L. & N. R. R. Co.* v. *Cook Brewing Co.*, 223, U. S. 70; *Loomis* v. *L. V. R. R. Co.*, 240 U. S. 43.

2. Paragraph No. (12) of Section 1 of the Interstate Commerce Act is a statutory declaration of the just and reasonable rule of coal car distribution originally laid down by the Interstate Commerce Commission in *Traer* v. *Chicago & Alton R. R. Co., et al.*, 13 I. C. C. 451, and *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and not found objectionable either on legal or constitutional grounds in *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452 and *Interstate Comm. Comm.* v. *C. & C. R. R.*, 215 U. S. 479.

Paragraph 12 of Section 1 is not, *per se*, a complete and workable scheme sufficient of itself to govern the distribution of cars to coal mines. It is far from it, and the mere requirement that mines shall be rated and that each and every car furnished shall be counted against the mine, does not cure the deficiency. To realize this one need only understand a small part of the difficulties of a car shortage situation, and peruse the distribution rules of the carriers in respect thereto. These are set out in full at pages 27 to 34 of the record.

Under these rules provision is made for a multitude of special conditions not in any way met by the twelfth

paragraph of Section 1. The latter speaks of cars as a physical unit; the carriers' rules avoid the inequality of this by specifying the 50-ton car as a unit, and calculating others accordingly (Rec. 33, rule 5). The statute speaks of mines in the abstract; the rules carefully distinguish between established and developing mines, recognizing the necessity of the latter for special attention, —a necessity always admitted by both carriers and mine operators (Rec. 2, rule h). Again, the rules make special provision for changes in rating of mines which supply coke ovens, another necessary incident of the whole business not at all provided for by the statute as the Coal Company construes it (Rec. 28, Rule d). Note also that under the rules all the operators in a mining district may rotate their mines in the enjoyment of such car supply as is available in a period of car shortage (Rec. 31-32, rule 3), but no such provision for obvious economy is permitted under the hard and fast interpretation which the Coal Company puts on paragraph 12. Another point of practical importance is that that hard and fast interpretation fails to recognize the problem of the partly loaded car which stands over until the next day, when the whistle blows the quitting hour. This is covered by rules 6 and 7 (Rec. 33-34). A somewhat similar situation arises as to cars loaded but not billed; these are adequately covered in the rules. (Rec. 31, Preamble). Furthermore, the rules require a periodic squaring of accounts between mines; the silence of paragraph 12 on this point would seemingly, as the Coal Company construes that paragraph, require a day to day balanced performance, an obviously impossible thing in railroad operation and so recognized by the National Coal Association (*post*, p. 38).

The Language of Paragraph 12 alone clearly shows it is intended as a statutory enactment of the Commission's Assigned Car Rule. To those acquainted with the trend of interstate commerce regulation there would seem to be no doubt or ambiguity respecting the intent of the Congress in enacting paragraph (12) of Section 1 of the Interstate Commerce Act. The pertinent language and that which is usually the basis of argument in the requirement on the carrier to "count each and every car furnished to or used by any such mine for transportation of coal against the mine."

It is significant that this particular portion of the statute is embraced in Section 1, the "just and reasonable" section as distinguished from the "anti-discrimination" sections. Paragraph 12 does not say that it shall be the duty of every carrier by railroad to make just and reasonable and non-preferential distribution of cars to coal mines. All reference to discrimination is omitted, although at one time proposed to be included, as hereinafter shown at page 35. And it has long been understood that the law does not prohibit every discrimination, but only that which is undue. *Regulations Restricting the Dimensions of Baggage,* 26 I. C. C. 292, at page 303.

The plaintiff's contentions require that it write into the statute words which will carry the statute beyond the mere requirement of counting the cars, and which would prohibit the carrier from effecting anything other than an exact balance between mines in the ultimate distribution of all cars. If this had been the intent of the Congress, it would undoubtedly have used words calculated to impress upon the carrier the duty of distributing its cars not only justly and reasonably, but also without inequality. This it did not do.

The error into which the plaintiff has fallen is clearly shown in its petition (Rec. 9) where, after reciting the requirements of the law that the carrier count each and every car against the mine, the petition goes on to assert that the plaintiff "is further entitled to the benefit and protection of provisions of said Paragraph 12 of said Section 1 to the end that no other coal mine located on defendant's line shall receive a greater proportionate share of such cars either because of failure of defendant to apply said mine ratings to or count each and every car as aforesaid or for any other cause or reason whatsoever." These words, it is submitted, contend for an evenly balanced distribution of all cars, assigned and non-assigned, not required by the bare language of the statute, that the carrier shall "count" each and every car against the mine.

Strangely enough, the Circuit Court of Appeals, in its decision in this proceeding (Rec. 128) seems to fall into the same error where it says:

> "We cannot doubt that by sub-division 12 of Section 402 the Congress clearly expressed the intention to abolish all preference to mines furnishing railroad fuel coal under the assigned car rule in periods of ordinary car shortage. The count of each and every car required is not a mere independent futile enumeration; but a count of each and every car furnished or used against the mine to the end that there should be a proportional distribution of all available cars resulting in fair and equal opportunity to each mine on the basis of its rating."

This language of the Circuit Court of Appeals, it is respectfully submitted, goes far beyond what the requirement of the statute justifies, and necessarily reads into the Act language which is not there and which, as

will be later shown (*post*, pp. 36 and 42) was specifically excluded. Moreover, the "count" made under and in accordance with the rule of the *Traer* and *Hocking Valley* cases, *supra*, is by no means "a mere independent futile enumeration," as the court below puts it. It is a very potent feature of the application of the rule, its very useful purpose being to ascertain whether the assigned cars are less than or equal or exceed the distributive share to which the mine is entitled of all cars. This ascertained, the ultimate just and reasonable distribution of non-assigned cars becomes possible, and not until then is it possible, for upon this ascertainment depends whether or not the mine receiving assigned cars shall in addition receive any non-assigned cars.

It would seem well at this point to review in chronological order the various assigned car rules which have been effective during the years this controversy has engaged the attention of the Interstate Commerce Commission. The original rule condemned in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co., supra*, was described by the Commission at page 402 of its report in this language:

> "The defendant, the Wheeling & Lake Erie Railroad Company, owns 11,400 cars. The basis of its system of distribution of cars among the mines is the tonnage rating of the mine. It states that cars on its line are divided into three classes:
>
> (a) System cars, which include cars owned by the defendant, or such as may be on its line of railroad and not owned by some specific shipper or restricted as to use.
>
> (b) Foreign railway fuel cars, which include cars of foreign railroads specifically consigned to certain operators to be loaded by the operators with coal for the use of such foreign railroad in the operation of its railroad.

(c) Private cars, which include cars owned or leased or subject to the exclusive control of particular persons or corporations.

It admits that the "system" cars included in class (a) are distributed among the coal operators in proportion to their immediate requirements based upon the tonnage rating of their mines, but that in making such distribution foreign railway fuel cars and private cars are not counted. It also alleges that if such foreign railway fuel cars were counted in thegeneral distribution the supply of such cars would be cut off or greatly diminished."

In *Traer* v. *Chicago & Alton Railroad Co., et al., supra,* the Commission's recital of the rule condemned was as follows:

> "In establishing a system of car distribution the defendants have given the several mines located on their respective lines daily tonnage ratings, which ratings are not at issue in this controversy. Under the system established, each mine is entitled daily to such percentage of cars as its tonnage rating bears to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars, and private cars are not charged against the distributive shares of the mines to which they are assigned. After the assignment of such cars to said mines, each is given the same percentage of the remaining cars available for distribution that day as if it had received no cars at all."

The distribution plan condemned in *Royal Coal & Coke Co., et al.* v. *Southern Ry. Co., supra,* was briefly stated to be:

> "The tonnage of the cars for defendant's railway fuel supplied to the fuel contract mines was deducted from the rated capacities of such mines

> and the remainder was considered the rating of these mines on which they shared with purely commercial mines in the pro rata distribution of cars available for commercial shipments."

These condemned rules were concrete examples of rules which the Commission considered did not result in counting the assigned cars against the mines receiving them. It was to cure the evil of such rules that the Commission prescribed the just and reasonable rule which required that all assigned cars, whether cars for company fuel loading, cars for foreign railway fuel loading, or privately owned or leased cars, must be placed in accordance with the assignment or consignment at the mines to which assigned or consigned, even though in excess of the distributive share of cars to which such mines were entitled; provided, however, that such cars must be counted against the distributive share of the mine receiving them, and that where the cars so placed equalled or exceeded the distributive share to which the mine was entitled on that day, no unassigned cars should be placed at the mine in addition to the assigned cars; but, that where the assigned cars placed at the mine did not equal the number of cars to which the mine was entitled as its distributive share for the day, sufficient unassigned cars should be placed at the mine to make the total placements for that day equal to its distributive share. (See Rec. 11, Paragraph 7).

This was the rule which, in the words of the Commission, "was not found objectionable either on legal or constitutional grounds" by this Honorable Court in *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452. See *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, *supra*. It was the rule which was maintained in effect thereafter throughout the war period, except that as an

incident of war time fuel control, as already pointed out (*ante,* p. 16), the railroad fuel car was taken out from under it in 1918. Observe that with this change the rule read (Rec. 48-49):

> "8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.
>
> "9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.
>
> "10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

And it will not be amiss to note that under this rule the Railroad Administration reserved to itself, through its proper Department, the right to assign cars,—an obviously wise provision to care for any situation that might have arisen because of failure of the Fuel Administration adequately to function respecting the distribution of railroad fuel or any other coal.

All that was done by the Interstate Commerce Commission in its emergency direction of April 15, 1920, was to reinstate the railroad fuel car in the rule, and thus to re-establish the old rule *in toto.* The Car Service Sec-

tion of the Railroad Administration was then no longer existent,—manifestly it could not function under war time Rule 8. The Fuel Administration had also long before ceased its labors,—it was equally manifest that it could not longer protect railroad fuel necessities. The natual course was the re-establishment of the pre-war status. The Commission re-established it, directing the observance of the new Rule 8 by all carriers in these words (Rec. 24, 42, and 49):

> "8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.,* vs. *H. V. Ry. Co.,* 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co., et al.,* 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

The outstanding point in all these cases and the rule of car distribution which was evolved from these cases is that there is no inconsistency whatever in counting the cars against the mine and simultaneously placing assigned or consigned cars at the mine in excess of the distributive share. Beyond any possibility of doubt, the cases do not warrant the theory that the mere counting of the cars against the mine excludes the idea of assigning cars. Such a theory is utterly destroyed by the fact that the Commission, in the *Hocking Valley, Traer,* and other cases, *supra,* over and over again permitted the assigning of cars while at the same time it directed that all cars placed must be counted.

Not only is there no dictionary meaning of the word "count" which justifies the position of the plaintiff, but there is, as has been shown, a customary and accepted understanding of that word in the regulation of inter-

state commerce, particularly car service, by the Interstate Commerce Commission that expressly negatives the meaning attributed to the word by the appellant. Over and over again the Commission in these assigned car cases, has declared that each and every car must be counted against the mine, but simultaneously, in the same decisions the Commission has made it clear that the consigned and assigned cars, whether for company fuel, for foreign railway fuel, or privately owned or leased, must be placed in accordance with the consignment or assignment, even though in excess of the distributive share of the mine to which such cars were consigned or assigned.

The view held by the District Court of the Northern District of Alabama, Southern Division, in *Corona Coal Co.* v. *Southern Ry. Co.*, 266 Fed. Rep. 726, in adjudicating a controversy very similar to this, seems correct. There, in speaking of assigned cars for railroad fuel, the Court said, at page 727:

> "It is established—indeed, it is not controverted—that such cars are counted against the distributive share of the mines to which assigned, and that such mines are not given a share of the cars available for ordinary commercial shipments, unless, and to the extent only, that the assigned cars fail to equal the distributive share of these mines, which receive the assigned cars."

Respecting the connection between the assigned car rule of the Commission and paragraph 12, the Court, at page 729, said:

> "Prior to the amendment of the Interstate Commerce Law by the insertion in paragraph 12 of the words 'and to count each and every car furnished to or used by any such mine for transportation of

coal against the mine,' this rule, now statutory, had been by order of the Interstate Commerce Commission a rule of long standing for the government of railroads, and it had been often sanctioned by the courts in adjudicated cases. So it can be said that this approved rule, in effect already law, was by the Transportation Act of 1920 merely crystallized into statutory form."

And, again on this same subject at page 732, is the language:

"The origin and history of the phrase 'apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mines for the transportation of coal against the mines,' shows the reason for its adoption by the Commission and its incorporation afterwards into the statute. Congress knew that at one time assigned cars were not taken into account in the distribution by the carriers to mines served by them, and that the mines receiving assigned cars were given the same pro rata share of the ordinary commercial cars as were given to the mines that received no assigned cars, and that the assigned cars were not counted against the mines favored with them. In the Hocking Valley Case, 12 Interst. Com. R 398, and in Traer Case, 13 Interst. Com. R. 451, this practice was complained of and held to be unjust and not to be allowed. When this question came before the Supreme Court of the United States, the decision was upheld in I. C. C. v. C. R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. It is well to read the opinion in the Traer Case, rendered by Commissioner Clark, now Chairman of the Interstate Commerce Commission. It may be ventured that Congress did not intend to change the meaning of the phrase 'count against the mine' or to enlarge the scope

> of the rule which is referred to in the Ill. C. R. R. Co. Case, supra, and the Morrisdale Coal Co. Case, supra."

Beyond this the District Court in this same case very naturally took the position that—(p. 733)

> ". . . if the plaintiff's interpretation of Paragraph 12 should be followed it would be to read into the statute a provision which it does not contain and which it seems clear that Congress failed or refused to write there or elsewhere as a part of the Act. It would have been a very easy matter, if Congress had adopted plaintiff's view, to have added to Paragraph 12 words of this purport:
>
> 'There shall be distributed to the mines their proportionate number of cars according to mine ratings, whether or not the cars or any of them be assigned cars.'
>
> Congress did not adopt such idea, and for the courts to adopt it would be to add to the statute, and would, in effect, also greatly tend to destroy the power and usefulness of the Interstate Commerce Commission in time of distress and car shortage, and cause confusion in the distribution of cars in the mining districts."

It should be borne in mind that while this controversy and while the controversy in *Corona Coal Co.* v. *Southern Ry. Co. supra.* was one respecting assigned cars for railroad fuel loading, the statute makes no distinction, nor does the rule of the carriers under attack, make any distinction between railroad cars assigned for railroad fuel loading and privately owned cars assigned for the owner's loading. What was said by the District Judge with respect to the probable course of Congress, had that body really intended to abolish the right of a carrier to assign cars for its own or a foreign railway's

fuel coal loading, applies *a fortiori* to the assigned privately owned car. Certainly, Congress would not have taken away the right of the private car owner to the utilization of his own cars from day to day to the fullest extent available regardless of the distributive share of carrier owned cars which might accrue to competing mines, by the employment of such language as is contained in paragraph 12.

Moreover, a close reading of Paragraph 15 of Section 1 and a comparison of Paragraph 12 therewith, throws further and clearer light upon the real intent of Congress on this general car question. In Paragraph 15, which confers upon the Commission certain powers over car service during emergency periods, it will be observed that that power, so far as relates to the handling of locomotives, cars, and other vehicles during the emergency, is expressly limited by subdivision (b) (see *ante*, p. 5) to control over *railroad owned* equipment. The limitation is accomplished by the insertion of the three words, "as between carriers," and expressly denies to the Commission the power even in time of emergency, to disregard the private rights of the private car owner in his own equipment. It is inconceivable that Congress legislating for the effective control of railroad equipment during periods of emergency would have expressly saved to himself the rights of the private car owner in his own car in paragraph 15, if just previously, in paragraph 12, those rights had been taken away from the private coal car owner during ordinary times with no particular emergency existent.

Not only this, but paragraph 15 refers to all cars, while paragraph 12 refers only to cars for coal loading. If the contention of the plaintiff is sound, it necessarily follows that Congress has discriminated between private

cars for coal loading and all other private cars, saving to the owners of the latter all of their rights, even in time of emergency, and denying to the owner of the private coal car at all times all of his rights in his own equipment. This would be class legislation with a vengeance.

Another point to be borne in mind is that had Congress intended the abolishment of the rights of the private coal car owner in the use of his own equipment, it most certainly should and would have provided compensation for such taking of private property. This was certainly not done in paragraph 12, nor is there any direct reference to such provision for compensation in paragraph 14 of Section 1, wherein the Commission is generally empowered to fix the compensation for car service between using carriers and the owners of the equipment. The point to be noted with respect to paragraph 14 is that the compensation authorized to be established by the Commission is that to be paid for the use of equipment "not owned by the carrier using it." This is not by any means a provision intended to compensate for an absolute taking of the private car from the owner. Should the right of the private car owner to the use of his own equipment be taken from him, he most certainly could not be expected to continue the ownership of such equipment, yet the statute provides no compensation for him except that for its use by a carrier not the owner.

Again, on this same point, as will be later shown, Congress expressly rejected language which clearly was intended to abolish the right of the private car owner to the use of his own car as accorded to him under the assigned car rule of the Interstate Commerce Commission. (*post*, pp. 36 and 42.)

Attention should also be paid to the fact that the rule laid down in paragraph 12 governs only the distribution of cars to mines. But coal is loaded elsewhere than at mines, and this is true of railroad fuel coal. The appellant's interpretation of paragraph 12 would deny the protection of adequate car supply for railroad fuel coal loaded at mines, but would not touch the right to assign cars for railroad fuel coal loading at coastwise, lake, or river docks, or at storage bins. The truth of the situation is that the Commission's assigned car rule is a rule for mine loading, as will appear from the cases cited, and as such was enacted into statute law.

But if it be admitted that the language of paragraph 12 of Section 1 is ambiguous and leaves the legislative intent in doubt, then it is proper to search the legislative history in order to determine, if there possible, just what the evil was which the Congress intended to cure. *Church of the Holy Trinity* vs. *U. S.* 143, *U. S.* 457.

The Legislative History of Paragraph 12 *clearly shows it is intended as a Statutory Enactment of the Commission's Assigned Car Rule.* The legislative history of the Transportation Act, 1920, is found in the records of the 66th Congress. It shows that the original Senate Bill, including the amendments agreed to by the Senate, was known as "S. 3288," and was entitled "A Bill Further to Regulate Commerce among the states and with foreign nations and to amend an Act entitled An Act to Regulate Commerce, approved February 4, 1887, as amended," Section 34, page 76, provided as follows:

> "It shall further be the duty of every carrier, by railroad subject to this Act, serving coal mines located upon its line or lines to make just, reasonable, and non-discriminatory distribution among

such mines of all cars available for the transportation of coal during any period (hereinafter called a car-shortage period) when the carrier's supply of cars for such service does not equal the requirements of such mines. To that end, every carrier shall make and establish rules and regulations providing for the rating of such mines and, during car-shortage periods, the distribution of cars among them in proportion to such ratings. The rules and regulations so established shall provide, among other things, that each and every car furnished or used for the transportation of coal during a car-shortage period shall be counted against the proportionate distributive share of the mine receiving or using it, and that no car shall be furnished to or used by any mine for the transportation of coal during a car-shortage period in excess of the proportionate distributive share of such mine, regardless, in either case, of who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or the ownership of such car or cars. It shall be unlawful for any such carrier, by any rule, regulation, or practice, either directly or indirectly, to fail or refuse to count against the proportionate distributive share of any mine, any car or cars furnished to or used by such mine for the transportation of coal during a car-shortage period, or to furnish to any mine for the transportation of coal during a car-shortage period any car or cars in excess of the proportionate distributive share of such mine, regardless, in either case, of who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or of the ownership of the car or cars. The proportionate

distribution required by this paragraph shall be accomplished during successive fourteen day periods which may be designated from time to time by the carrier; Provided, That in the event the Board finds that it is necessary in order to furnish transportation companies with coal to be used in the movement of trains, cars to be loaded with coal to be used for fuel in the movement of trains may be omitted in the said count to the extent, and only to the extent, prescribed by the order of the board. . . . ."

That this bill, with the exception of the last provision, which was to give to the proposed Transportation Board the power to allow the carriers to use cars for railway fuel in any number, was the bill which the National Coal Association was strongly advocating is shown by letter submitted by Mr. J. D. A. Morrow, Vice-President, National Coal Association, dated September 4, 1919, reproduced on page 2170 of the record hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, R. R. 4378. This letter reads as follows:

"National Coal Association,
Washington, D. C., September 4, 1919.

Hon. John J. Esch,
House of Representatives, Washington, D. C.

My dear Mr. Esch:

After submitting the proposed amendments of the Esch-Pomerene bill H. R. 4378, to the House Interstate Commerce Committee on August 28, the National Coal Association, in conference with its general counsel, gave further consideration to the third amendment as submitted and came to the conclusion that it was defective in the following

respect. It was subject to the construction that the carrier must equalize the distribution of cars every day during a car-shortage period which would in certain cases be a practical impossibility. We, therefore, prepared a new draft of this amendment, substituting for the phrase 'on any day or days on which there is a car-shortage on its line' the phrase 'during a car-shortage period;—and adding the following provision: 'The proportionate distribution required by this paragraph shall be accomplished during successive 14-day periods which may be designated from time to time by the carriers.'

Our amendments as originally proposed have been in substance embodied in the Cummins bill, S. 2906, and we have today conferred with Senator Cummins respecting the changes in the third amendment just referred to. Those changes are satisfactory to the Senator and we understand from him will be inserted in the Senate Bill. The amendments will then be satisfactory to us and we desire to urge your committee to incorporate them in the House bill.

For convenient reference the amendments now embodied in the Senate bill No. 2906 (introduced by Senator Cummins) will be found at the following places:

First amendment, page 49, lines 21 to 23.
Second amendment, omitted.
Third amendment, from 52, line 12, to page 54, line 5.
Fourth amendment, page 61, lines 4 and 7.
Fifth amendment, omitted.

If these amendments meet with your approval it does not appear to us to be necessary to have a hearing before your committee, unless the other members desire some information. In that case, we will be glad to appear at any time you may

designate, and in any event, I have asked Mr. John Callahan, our traffic manager, to call on you in regard to the matter.

Very truly yours,
J. D. A. MORROW, Vice-President,
National Coal Association."

And the third suggested amendment (which deals with car distribution) referred to by Mr. Morrow, reads, word for word, the same as Section 34 of the Senate Bill as just set forth save for the last provision, giving power to the Transportation Board to assign railway fuel cars, which quite naturally is omitted from the amendment suggested by the National Coal Association.

At this time the House Bill No. 4378 was under consideration, and contained the following provision:

> Section 402—"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. . . . ."

The National Coal Association was endeavoring to have its third suggested amendment substituted for this Section 402.

The substituted amendment was presented to the House by Mr. Loos, one of counsel, National Coal Association. See pages 2172 to 2191,—Hearings before the

Committee on Interstate and Foreign Commerce of the House of Representatives, H. R. 4378. The National Coal Association had accomplished its purpose in the Senate in its attempt to deprive the railroads of all right to use their coal cars for the carriage of their fuel coal and to deprive the private car owners of the right to use their own cars, the theory of its proposed amendment being to require the absolutely pro rata distribution of all cars based on mine ratings. But even here, a proviso had been inserted by the Senate Committee as already shown (*ante,* p. 37), which would have permitted the Transportation Board to have deviated from the strict rule of the proposed statute so as to protect railroad fuel coal.

The House Committee called Mr. E. E. Clark, Chairman of the Interstate Commerce Commission, before it to furnish information with respect to the amendments proposed by the National Coal Association. Mr. Clark's statement from pages 2926 and 2927 of the record of hearings before the House Committee on Interstate and Foreign Commerce, H. R. 4378, follows:

> "The Chairman. Mr. Clark are you familiar with the provision inserted in the Cummins bill with reference to coal car distribution? They have a section devoted to it.
>
> Mr. Clark. I remember there is such a section, but at the instant I do not recall the particular provision.
>
> The Chairman. It seeks to carry into the law the orders of the director general now with reference to car distribution.
>
> Mr. Clark. That leads me to say that in the earlier days of the Railroad Administration this

very question of refraining from counting against the distributive share of the mine the cars that were sent for the carriers' own fuel supply came up. Some members of the director general's staff favored going back to the old practice of the railroads; others of them favored following the rule laid down by us and sustained by the Supreme Court. We were asked for information and advice on the subject. My understanding is that the rule adopted was based upon the principles laid down by us, and that they are following the practice of counting those cars against the distributive shares of the mines.

The Chairman. You will be in favor of legislation of that kind being incorporated in any bill, so as to make it a statutory matter and not really a matter of regulation.

Mr. Clark. I can see no objection to it, although I do not see any crying necessity for it now, because I think that rule is almost, if not entirely, universal.

The Chairman. The idea expressed by the representative of the coal association was that when federal control ended there might be a recurrence to the old practice.

Mr. Clark. Well, I think that is the sound rule, and I think it is the right rule. It has stood the test of adjudication at the hands of our commission and at the hands of the Supreme Court of the United States. So I can not see any possible objection to carrying it into the statute."

See also in this same connection, *Assignment of Freight Cars*, 57 I. C. C. 760.

The House Committee refused to adopt the National Coal Association's amendment and the House bill, H. R. 10453 as passed contained in Section 402, paragraph (12)

as heretofore quoted, *ante*, p. 39, that is to say, it contained the rule which provided that each and every car furnished to or used by any mine for transportation of coal must be counted against the mine, *and it did not contain the provisions of the National Coal Association amendment, which, after requiring the counting of all cars, provided that "no cars shall be furnished to or used by any mine for the transportation of coal in excess of the pro rata distributive share of such mine, regardless, in either case, of who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded to or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended, or of the ownership of such car or cars."* (*ante*, p. 36.) The fact that this amendment originally suggested by the National Coal Association was omitted from the Act, as finally reported to both houses and passed is not only significant, but conclusive against the contention of the plaintiff, *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184 at 198-199.

The Chairman of the House Committee on Interstate and Foreign Commerce in Report No. 456, page 17, to the House of Representatives on Bill H. R. 10453, advised the House as follows:

"CAR SERVICE

"Section 402 amends the car service act of May 29, 1917, in several particulars. Originally the term 'car service' included 'the movement, distribution, exchange, interchange, and return of cars used in the transportation of property.' As amended the term is made to include the use, control, supply, movement, distribution, etc., not only of cars, but of locomotives and other vehicles. It is further extended to include 'the supply, movement, and

operation of trains by any carrier by railroad subject to this act,' and so require every carrier by railroad 'to furnish safe and adequate car service.' In a recent decision of the Supreme Court of the United States it was held that under the commerce act the commission does not have the authority to order a common carrier to supply itself with certain cars. The pending bill gives the commission such authority. The same section makes it the duty of every common carrier, or railroad 'to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine.' During Federal ntrol such a rule has been followed by ne Direc. n General and the committee follow decisions of the Interstate Commerce Commission and the present practice and has put in form of law what has been enunciated as proper practice."

See also *Assignment of Freight Cars, supra.*

The Senate bill containing the National Coal Association amendment and the House bill which did not contain the National Coal Association amendment went to conference. The conferees rejected the provisions of the Senate bill and retained the provisions of the House bill. The Conference Committee's Report, No. 650, page 61, to the House, with respect to Car Service—Coal Cars—includes the following:

"Section 402 of the House Bill required carriers

> by rail to make just and reasonable distribution of cars for the transportation of coal among coal mines served by them, and, in time of car shortage, to maintain and apply just and reasonable ratings of such mines and to count against each mine every car furnished to it. Section 34 of the Senate amendment required carriers by rail, during any period of car shortage, to make just, reasonable, and non-discriminatory distribution of cars to coal mines, to establish regulations providing for rating such mines and the distribution of cars among them, to count against each mine every car furnished to it, and not to furnish cars in excess of such ratings, and exception being made in the case of cars used for coal necessary for the movement of trains. The provisions of the House bill were agreed to, and are contained in Section 402 of the conference bill."

Manifestly the conference committee recognized the precise difference in the two bills in this respect. The Senate draft in precise language required a distribution between mines which should be absolutely and evenly balanced on the basis of mine rated capacity. The obligation thus proposed to be laid on the carrier that it should furnish no cars to any mine in excess of the proportionate distributive share so ascertained made this requirement explicitly, without regard to "who the consignor or consignors or the consignee or consignees or the owner or owners of the coal loaded or to be loaded in such cars may be, or of the purpose for which such coal may be used or intended or of the ownership of such car or cars." The language suggested as already said by the National Coal Association (*ante*, p. 37), may be said to have sought to make assurance doubly sure twice. Nothing whatever of this nature was included in the House draft. It re-

quired only a just and reasonable distribution, the maintenance of just and reasonable mine ratings, and the counting of each and every car furnished against the mine. The conference committee rejected the Senate draft *in toto*. It accepted the House draft, and the latter is now paragraph 12 of Section 1. It is plain that when Congress in Section 402 of the Transportation Act 1920, amended Section 1 of the Act to Regulate Commerce by the inclusion of paragraph (12) it merely enacted into statute law the administrative rule of car distribution laid down in the *Hocking Valley* and *Traer* cases, *supra,* approved by the Supreme Court of the United States in the *Illinois Central* case, *supra,* and universally in force throughout the United States for many years. There can be no gainsaying the fact that Congress deliberately rejected the interpretation which the National Coal Association attempted, through its amendment, to have placed upon the words, "counted against the mines," and instead, enacted into law the interpretation placed upon those words by the Interstate Commerce Commission and the Supreme Court of the United States, and by common usage.

Clearly, on this showing of the statute itself, and of the record of its making, there would seem to be no room for doubt that paragraph 12 of Section 1 of the Interstate Commerce Act is a statutory enactment and no more and no less, of the rule laid down by the Interstate Commerce Commission in the *Traer* and *Hocking Valley* cases, *supra,* and sustained by this Court in the *Illinois Central* and *Chicago & Alton* cases, *supra.* And this is precisely the view adopted by the Interstate Commerce Commission in answering the Senate's inquiry on the subject, for it said (Rec. 193) in *Assignment of Freight Cars, supra,* at page 766:—

"The Commission is of the opinion that para-

graph 12 of section 1 of the interstate commerce act does not change the rule of law laid down in the *Hocking Valley* and *Traer* Cases, *supra*. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States."

The Commission's practical interpretation of the statute given by it as the administrative body charged with its enforcement is entitled to great weight. *B. & M. Rd.* v. *Hooker*, 233 U. S. 97. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361 at 401-402.

The Commodities Clause is a factor in this Controversy.—It will be well to add, here, that the commodities clause, now embodied in paragraph 8 of Section 1 of the Interstate Commerce Act, expressly exempts from its operation coal produced solely for the railroad's common carrier use, in its owned or leased and operated mines. It is inconceivable that Congress should, under paragraph 12 as appellant contends it to mean, deny to the railroads operating mines producing their own fuel coal the very benefits already secured to them by the commodities clause. For manifestly those benefits are of little value if they cannot be protected by car supply in times of car shortage, and in addition cannot be utilized in commercial markets at any time.

The Transportation of Railroad Fuel Coal is private service, not commerce.—Another point which may also be briefly referred to is the character of the service performed by these railroads in transporting their fuel coal. It has frequently been held that where a Railway Company transports its own company materials over its own

line of railroad, it merely performs for itself a purely private service and is not enaged in interstate commerce within the meaning of the Interstate Commerce Act. *Santa Fe R. Co.* v. *Grant Bros.*, 228 U. S. 177. The same principle has been upheld with respect to the transportation of oil by pipe line. *U. S. v. Ohio Oil Co.*, 234 U. S. 548. In the *former case* the Supreme Court sustained the ruling of the Commission in the matter of *Railroad–Telegraph Contracts*, 12 I. C. C. 10, where the Commission laid down the principle that where a common carrier transports its contractor's labor and material used in the construction or maintenance of its railroad it may do so without regard to the provisions of the Interstate Commerce Act. Seemingly this must be so *a fortiori* where the railroad hauls its own company material and not the material of its contractor.

In the *latter case* the oil companies, save the Uncle Sam Company, obtained a monopoly through their ownership of pipe lines, the independent producers being compelled to sell their oil to the pipe line company, which as the only available transporter, was the only market for such independent production. The Hepburn Amendment to the Act to Regulate Commerce made pipe lines transporting oil in interstate commerce common carriers. The Supreme Court held that in the peculiar circumstances of the situation they were common carriers and could no longer monopolize the oil market through the control of pipe lines and thereafter must transport as common carriers such oil production of independent producers as might be offered. The Uncle Sam Company, however, had purchased no oil from independent producers. It produced all its oil, and ran that alone and no other oil through its own pipe line to its own refinery. This Court held that in so transporting through its own pipe line all its own

oil produced by it the Uncle Sam Company was performing merely a private service and not the service of a common carrier under the provisions of the Hepburn Act, and that the provisions of the Interstate Commerce Act were not applicable to the transportation of its own oil through its own pipe lines.

The rate provisions of the Interstate Commerce Act have no greater legal sanctity than have the service provisions of that Act. It would seem, therefore, to follow that where a carrier transports its own company material or railroad property, it is not engaged in interstate commerce within the meaning of the Interstate Commerce Act, but is performing for itself a purely private transportation service, not amenable to that regulation which governs interstate commerce. Surely this would be particularly true with respect to coal produced in the carrier's owned or leased and operated lines, and hardly less so respecting the coal from a mine of which the entire output had been sold to a railroad.

3. Under paragraph (15) Sub-divisions (a) and (b) of Section 1 of the Interstate Commerce Act the Commission may, when the emergency condition specified in the Act is found, in its opinion to exist, suspend the operation of the car distribution rules and regulations established pursuant to paragraph (12) of the same section.

On this point the decision of the Judges of the Fourth Circuit says (Rec. p. 128):

"The authority given to the Commission by (a) subdivision 15 in cases of emergency 'to suspend the operation of any or all rules, regulations or practices then established with respect to car service' does not extend to the suspension of a positive and definite enactment of the statute covering the subject. Rules, regulations and practices

> mean the rules, regulations and practices adopted by the Commission or by the railroads in conformity to the act or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from subdivisions 11 and 14 of the same section and other portions of the statute. If therefore the order of the Commission has no other basis than the authority conferred to suspend rules, regulations and practices it would be without support. *Morrill* v. *Jones,* 106 U. S. 466; *United States* v. *United Verde Copper Company,* 196 U. S. 207; *Williamson* v. *United States,* 207 U. S. 425; *United States* v. *Grimaud,* 220 U. S. 506."

These cases, relied upon by the court below to support its view, are not strictly in point here. In each instance there was involved the validity of certain permanent regulations issued by government departments in furtherance of administrative functions conferred upon them by Congressional delegation to give effect to general statutes. There was not, as is the case here, anything analogous to temporarily setting aside, because of an emergency, a carrier's rules established in compliance with a statutory obligation the maintenance of which may be incompatible with the intent of Congress respecting how the emergency should be met.

But however this may be, it is admitted that the language of paragraph 15, sub-divisions (a) and (b) is not apt to justify an out-and-out suspension of paragraph 12 of Section 1 of the statute, for as the court below well points out, those sub-divisions go only to the suspension of car service rules, regulations or practices. The same distinction is a second time made by the court (Rec. 130). The difficulty is that the court finds itself unable to justify the Commission's emergency order and direction of

April 15, 1920, suspending existing car distribution rules and directing the establishment of emergency rules in lieu thereof, under these two particular sub-divisions.

To be sure, the Circuit Court of Appeals did find within the priority provisions of sub-division (d) of paragraph (15) other language under which it could and did justify the Interstate Commerce Commission's emergency direction issued April 15, 1920. On this point the Court said (Rec. p. 129):

> "We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that 'whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority . . . (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them.'"

The necessity for going to this extent is not apparent. Congress has defined the term "car service" to include, among other things, the "distribution" of cars, and seemingly the *suspension* of car distribution rules is therefore specifically contemplated in sub-division (a) of paragraph (15) reading: ". . . to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission." Likewise, the *establishment* of emergency car distribution directions is specifically contemplated in sub-division (b). That the Commission is in accord with this interpretation of paragraph

(15) clearly appears from its answer to the United States Senate respecting its assigned car order of April 15, 1920 (Rec. p. 103). Note that in this connection, before announcing that the direction of April 15, 1920, was issued under the authority of paragraph (15) the Commission recites merely the power therein given to suspend existing car service rules and establish emergency car service directions, these being sub-divisions (a) and (b). No reference is made by the Commission to the priority provisions of that particular paragraph, established in subdivision (d).

The soundness of this view is further demonstrated by an analysis of the car service amendments to Section 1 of the Act to Regulate Commerce in May, 1917. The emergency authority then conferred upon the Commission extended only to the suspension of existing car service rules, and the establishment in lieu thereof of emergency car service directions. No power was incorporated in the statute authorizing the Commission to effect priority of transportation. Those amendments also included what is now paragraph (11) of Section 1 of the Interstate Commerce Act, obligating the carrier to effect just and reasonable distribution of cars to all shippers. If the view of the Court below, that the Commission's action can only be sustained under sub-division (d) of paragraph 15, is to govern, it necessarily follows that in 1917, when the Commission possessed no priority powers, but only the power to suspend car service rules and substitute car service directions, it had no means of meeting a car service emergency. This, it is admitted, would be a rather violent assumption in view of the great endeavors hastily made by Congress through the car service amendments to the Interstate Commerce Act to meet the very pressing

transportation situation which had then for some time existed incident to our preparation for entrance into the world war.

There are words and phrases in the nomenclature of American railroading and of the regulation of interstate commerce which are a bit vague as to meaning. But the phrase "car distribution" is not in that class. The veriest tyro in the business knows that car distribution expresses a relation between carrier and shipper, — expresses the service of furnishing cars on the part of the carrier and to the shipper. That the carriers so understand the phrase is apparent from their description of their own rules to govern this relation with coal mines as "Rules for Rating for Car Distribution Purposes . . .." That the appellant and other coal shippers so understand the phrase is apparent by the constant use of it in exactly this meaning throughout the bill of complaint (Rec. pp. 8, 9, 10, 11) and from the affidavits of other shippers that they have read and understand that bill of complaint. That the Interstate Commerce Commission so understands the phrase is clearly shown in all its reports, many herein already cited, on questions of car relation between carriers and shippers. Indeed it can hardly be conceived that any one would seriously contend to the contrary, or that Congress had not intended that car distribution between carriers and shippers ~~to be outside~~ should be within the pale of the service provisions of the Act. For that matter, all that there is to paragraph 12, Section 1, is a provision respecting car distribution by carriers to coal mines.

It is well to keep in mind that whereas paragraph (12) of Section 1 calls for just and reasonable rules for distributing cars to coal mines, the preceding paragraph (11) makes the same call with respect to all car distribution.

There is not in paragraph 11, any more than in paragraph 12, any express proviso suspending its operation, or suspending rules established thereunder during the effectiveness of emergency directions as to car service issued by the Interstate Commerce Commission under paragraph 15 of Section 1. It was argued in the Court below and will no doubt be pressed again, that as paragraph 12 contains no proviso suspending its operation when the emergency powers of paragraph 15 are exercised, it stands for all time and under all circumstances unaffected by paragraph 15 or anything done in pursuance thereof. It may with equal propriety be argued that as paragraph 15 applies to "all rules, regulations, or practices, then established with respect to car service," and as Congress embodied no proviso therein specifically exempting from its operation rules established pursuant to paragraph 12, then such latter are necessarily included within the broad language of paragraph 15.

But even this argument is unnecessary. The so-called car service provisions of Section 1 of the Interstate Commerce Act first became law in what was known as the Esch-Pomerene bill, Public—No. 19—65th Congress, approved May 29, 1917, the official title being:—

> An Act to amend an Act entitled "An Act to regulate commerce," as amended, in respect to car service, and for other purposes.

Observe that it was specifically "in respect to car service," and examination will show that it made routine provisions and followed them by a general emergency provision. When the amendments in the shape of the Transportation Act, 1920, were passed, Congress followed the same course. It elaborated somewhat the orig-

inal routine car service provisions and inserted a new one in the paragraph numbered 12 here in controversy, but again it followed all these routine provisions with the general emergency provision, also somewhat elaborated. Undoubtedly had Congress desired, it could have closed all these routine paragraphs with a semi-colon, followed by the words, "provided, however, that," and these in each case followed by the language of paragraph 15, and this may possibly have foreclosed some argument by this appellant. But quite naturally Congress did no such inane thing. It had originally enacted a car service bill complete in itself, with routine and emergency provisions inter-related and inter-dependent. In the Transportation Act, 1920, it did the same thing, with the result that each routine provision is subject in the whole to the final emergency provision in paragraph 15.

It would be strange indeed if Congress, enacting a complete scheme of service regulation intended as it clearly is to cope with all transportation emergencies, should have simultaneously expressly declared that a hard and fast aand invariable rule must govern at all times and under all circumstances in the distribution of cars for the loading of one of our basic commodities,—coal. In the light of our nation's experience with that commodity in the several years just past, including the war period, this would be almost ironical.

The doctrine laid down by this Court in *Field* v. *Clark*, 143 U. S. 649, is ample authority for the proposition that the power conferred upon the Commission by paragraph 15 of Section 1 to suspend car distribution rules, including those established pursuant to paragraph 12, is a perfectly valid delegation of administrative power. In that case, a revenue law provided exemption of certain import commodities from duties, as a reciprocal trade policy. But

the law left it to the President to judge whether the commercial regulations of the exporting countries were reciprocally equal and reasonable, or the contrary, and provided that when he determined the latter to be the case he should by proclamation suspend the exemption from duty, whereupon certain prescribed duties should be levied. This Court said at page 693:

> "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

So far as the nature of the problems which Congress foresaw and with which it has endeavored to cope in con-

ferring this emergency jurisdiction upon the Commission would permit, Congress in paragraph 15 has legislated as it did in the statute involved in *Field* v. *Clark, supra.* Where the President was there to ascertain the existence of a particular fact, the Commission is here to ascertain the existence of the emergency requiring *immediate* action. Observe the word *immediate,* implying the necessity for something to be done at once and without delay. Where the President was *required* to suspend the exemption statute, the Commission is here *authorized* to suspend existing rules, and the distinction obviously recognizes that administrative leeway is required in meeting transportation emergencies, just as in the routine regulation of commerce in normal times. Again, where the revenue law prescribed the duties which were to be effective during the suspension of the exemption, the law here limits the promulgation of emergency rules to such as "will best promote the service in the interest of the public and the commerce of the people,"—obviously a definite command to the administrative agency which clearly limits the extent to which it may go in meeting the emergency. Similar language is used as a definite command in routine regulation in other Sections of the Act.

It must be remembered that those portions of the Interstate Commerce Act with which we are here concerned deal with service. Service, unlike rates, is not a matter of mathematical precision and accuracy, and its immediate necessities cannot be foreseen in detail and be so provided for by statutory enactment. "The flexible limit of judgment which belongs to the power to fix rates," recognized by this Court in *Atlantic Coast Line* v. *N. Car. Corp. Comn.,* 206 U. S. 1-26, is at least equally a necessity of service regulation and this must obviously be especially

so of Service regulation calculated to meet all emergencies. Surely if the great *desideratum* of railroad service is to be met during any and whatever transportation emergency which may arise, there must be flexibility of judgment possible, and this Congress has wisely and lawfully recognized. The point is that the emergency is something requiring regulation and not legislation, and that its immediate necessities would not, indeed, permit of the latter. Congress could, at the time the emergency arises, delegate its regulation to the existing administrative body. Manifestly it can do so in advance, and it has done so by authorizing the suspension of existing rules, and the establishment of emergency rules within certain definite limits.

It is therefore respectfully submitted that under subdivisions (a) and (b) of paragraph (15) the Interstate Commerce Commission during the emergency periods may suspend the operation of the rules and regulations respecting car service established in pursuance of the requirements of paragraph 12.

4. The Commission's car service direction of April 15, 1920, was a valid exercise of the authority vested in the Commission by paragraph (15) of Section 1 of the Interstate Commerce Act.

The Commission's car service direction of April 15, 1920, has been previously set out (*ante*, p. 6). Therein the Commission recites that it "is of opinion that an emergency exists requiring immediate action." It then proceeds to suspend the operation of the existing car service rules of the carriers respecting distribution of empty cars to coal mines for coal loading, and next directs the observance of substitute rules to govern such

distribution of empty cars to mines until the further direction or order of the Commission. The sequence of the order follows the sequence of authority conferred upon the Commission in sub-divisions (a) and (b) of paragraph (15).

The condition precedent to the exercise of this power limits its employment to "whenever the Commission is of opinion" that the emergency exists. The order of April 15 not only clearly expresses the opinion that an emergency requiring immediate action does exist, but furthermore defines the nature of the emergency. It states that "the supply of cars available for the transportation of coal continues insufficient to meet the demand" and adds that the cessation of government control of coal production and distribution makes the issue of the direction necessary in order to protect railroad fuel requirements without confiscation of commercial coal.

The Circuit Court of Appeals with respect to this exercise of this emergency power by the Commission is clearly correct in its statement that (Rec. p. 130):

> "The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised. *Interstate Com. Com.* v. *Ill. Cent. R. R.*, 215, U. S. 452, 478; *Texas and Pac. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426."

Were this all that the Circuit Court of Appeals said on this subject further discussion thereof would be futile. But the court went beyond the particular language quoted and indirectly defined an emergency as a car shortage

which, in the opinion of the Commission, "was so much beyond the usual as to constitute an emergency." It is respectfully submitted that in this language the Circuit Court of Appeals went too far and that these words should not be permitted to stand as a qualification of the paragraph just quoted. Clearly, on the cases cited by the Circuit Court of Appeals itself, it is for the administrative body, and not for the court, to define what constitutes the emergency. *Interstate Com. Com.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 478; *Texas & Pac. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. It may well be, in the vicissitudes of transportation throughout the great United States that something considerably less extensive in its total result that the ordinary long continued car shortage may create an emergency requiring immediate action.

In closing, therefore, it is respectfully submitted that the Court should find, first, that the injunction order of the United States District Court for the Northern District of West Virginia was improperly made, the cause being either within the jurisdiction of three judges only, or within the jurisdiction of the Interstate Commerce Commission; second, that paragraph (12) of Section 1 is a mere statutory enactment of the administrative rule laid down by the Interstate Commerce Commission in the *Traer* and *Hocking Valley* cases, *supra*, to govern distribution of empty cars to coal mines; third, that the authority conferred upon the Interstate Commerce Commission under pargraaph (15), sub-divisions (a) and (b) of Section 1 of the Interstate Act, expressly empowers the Commission during emergency periods to suspend the operation of car distribution rules, including those established in accordance with paragraph (12) of the same section; and, fourth, that the Commission's order and direc-

tion of April 15, 1920, was a valid exercise of the power conferred upon it in paragraph (15) of Section 1, and particularly of the exercise of the powers conferred in sub-divisions (a) and (b) of that section.

And for the reasons herein set forth we further submit that the appeal in this suit should be dismissed.

Respectfully submitted,

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Solicitors for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 153.

LAMBERT RUN COAL COMPANY, *Appellant*,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, *Appellee*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR APPELLANT.

The argument for appellee opens with the contention, very briefly presented, that the District Judge erred in entering the injunction in this case without calling to his assistance two other judges, one of them a Circuit Judge, after notice to the Commission and to the Attorney General. The same contention is made at greater length in a brief for the United States, and in view of the form which it takes in the latter brief we deem it advisable to add to what was said upon this subject in our former argument.

This contention is of course based on the District Court Jurisdiction Act. If it were well founded—that is to say, if the case at bar were in fact a case in which that act required an application for temporary injunction to be heard by three judges, then the only course which this court can adopt is to reverse the decree of the Circuit Court of Appeals and remand the cause to that court with directions to dismiss the appeal, since the act expressly provides that the appeal from an order granting or denying an interlocutory injunction in cases which must be heard by three judges shall be to this Court, and the Court of Appeals was therefore without jurisdiction. 38 Statutes at Large, 219.

But it is quite clear that the application for the temporary injunction in this case was not within the Act. The provision with regard to temporary injunctions in that Act obviously applies only to injunctions sought in the "cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission," of which the Commerce Court was given exclusive jurisdiction by the Commerce Court Act.

That the case at bar was not brought to set aside or enjoin an order of the Interstate Commerce Commission within the meaning of the Commerce Court Act is conclusively established by the fact that, as the brief for the United States points out, the bill did not attack any order of the Commission, or pray any relief against such an order or, in fact, mention or refer to any such order. It was on its face purely a bill to enforce a statutory right, and it has been settled by an unbroken chain of decisions of this court, that when the question of jurisdiction depends upon the character of the suit,

that character is finally determined by the allegations of the plaintiff's pleading and can not be affected by anything alleged or set up as matter of defense.

See—

New Jersey Central R. R. Co. v. Mills, 113 U. S. 249.
Colorado Central Mining Co. v. Turck, 150 U. S. 138.
Tennessee v. Union and Planters' Bank, 152 U. S. 454.
Chappell v. Waterworth, 155 U. S. 102.
Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482.
Borgmeyer, Adms., v. Idler, 159 U. S. 408.
Oregon Short Line, etc., Ry. Co. v. Skottowe, 162 U. S. 490.
Press Publishing Co. v. Monroe, 164 U. S. 105.
Walker v. Collins, 167 U. S. 57.
Galveston, Harrisburg & San Antonio Ry. Co., v. Texas, 170 U. S. 226.
Florida Central & Peninsular R. R. Co. v. Bell, 176 U. S. 321.
Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185.
Boston & Montana Consolidated Copper and Silver Mining Co. v. Montana Ore Purchasing Co., 188 U. S. 632.
Louisville & Nashville R. R. Co. v. Mottley, 211 U. S. 149.
The Fair v. Kohler Die Co., 228 U. S. 22.
Healy v. Sea Gull Specialty Co., 237 U. S. 479.
American Well Works v. Layne, 241 U. S. 257.
Odell v. Farnsworth Co., 250 U. S. 501.

The ground upon which the rule established by these cases rests is clearly stated in *The Fair v. Kohler Die Co.*, 228 U. S. 22. In that case a bill was filed in a United States court praying an injunction against the sale by the defendant of certain articles, on the ground

that the articles were manufactured by plaintiff under a patent, were sold by plaintiff on condition that they should not be resold at less than one dollar and fifty cents, and that with notice of the condition, the defendant was selling them at one dollar and twenty-five cents, and was thereby infringing the patent. The defendant pleaded that it bought the articles from a jobber who had paid the plaintiff the full price, and that upon these facts the case presented no question arising under the patent law. The case was set down for hearing on the plea, and the court retained jurisdiction. The case went to the Supreme Court on the question of jurisdiction alone.

In disposing of this question Mr. Justice Holmes pointed out that the allegations of the plea must be taken to be true, but did not pass on the question whether they showed that the case did not present a question of infringement, because he held that the question of jurisdiction depended wholly on the allegations of the bill.

He said:

> "Obviously the plaintiff sued upon the patent law, so far as the purport and intent of the bill is concerned. It was a resident of the same State as the defendant and could have had no other ground. In the earlier paragraphs of the bill it charged an infringement of its patent rights in general terms, and it sought triple damages, which it could have done only by virtue of the statute. It is true that later it set up the sale at a dollar and a quarter as an infringement and that we may guess that this is the only one, although it does not say so. *But if that is the plaintiff's only cause of action, still the plaintiff relies upon it as an infringement and nothing else—so that, good or bad, the cause of action alleged is a cause of action under the laws of the United States.*

> "*Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill.* THAT QUESTION CANNOT DEPEND UPON THE ANSWER, and accordingly jurisdiction cannot be conferred by the defence even when anticipated and replied to in the bill. *Devine v. Los Angeles*, 202 U. S. 313, 334. Conversely, when the plaintiff bases his cause of action upon an act of Congress jurisdiction can not be defeated by a plea denying the merits of the claim. It might be defeated, no doubt, in a case depending on diversity of citizenship by a plea to the citizenship of parties. *Interior Construction and Improvement Co. v. Gibney*, 160 U. S. 217, 219. We are speaking of a case where jurisdiction is incident to a Federal statutory cause of action. Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that it is good. See *Fauntleroy v. Lum*, 210 U. S. 230, 235.

In the subsequent case of *Healy* v. *Sea Gull Specialty Company*, 237 U. S. 479, the doctrine of this case was affirmed and restated by the same justice in the following language:

> "It may be that the reasoning of *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, is more consistent with that of Mr. Justice Bradley's dissent in *Hartell v. Tilghman*, 99 U. S. 547, 556 (a decision since explained and limited, *White* v. *Rankin*, 144 U. S. 628), than with that of the majority, but it is the deliberate judgment of the court and governs this case. *As stated there, the plaintiff*

is absolute master of what jurisdiction he will appeal to; and if he goes to the District Court for infringement of a patent, unless the claim is frivolous or a pretence, the District Court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious disputes. *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282. *Jurisdiction generally depends upon the case made and relief demanded by the plaintiff, and as it cannot be helped, so it cannot be defeated by the replication to an actual or anticipated defense* contained in what used to be the charging part of the bill. For the same reason it does not matter whether the validity of the patent is admitted or denied."

In *American Well Works* v. *Layne*, 241 U. S. 257, the court had occasion to consider the converse of the situation presented in the two cases just cited.

The case was a suit brought in a state court for damages alleged to have been suffered by plaintiff from statements by defendant that a pump manufactured by plaintiff infringed certain patents of defendant. The suit was removed to a United States Court and there dismissed on the ground that it was a case arising under the patent laws, and therefore not within the jurisdiction of the state court. The Supreme Court held that this was error.

Mr. Justice Holmes said:

"*Of course the question depends upon the plaintiff's declaration.* The *Fair v. Kohler Die Co.*, 228 U. S. 22, 25. That may be summed up in a few words. The plaintiff alleges that it owns, manufactures and sells a certain pump, has or has applied for a patent for it, and that the pump is known as the

best in the market. It then alleges that the defendants have falsely and maliciously libeled and slandered the plaintiff's title to the pump by stating that the pump and certain parts thereof are infringements upon the defendant's pump and certain parts thereof and that without probable cause they have brought suits against some parties who are using the plaintiff's pump and that they are threatening suits against all who use it."

In stating the reason for reversing the District Court he said:

> "A suit for damages to business caused by a threat to sue under the patent law is not iself a suit under the patent law. And the same is true when the damage is caused by a statement of fact —that the defendant has a patent which is infringed. What makes the defendant's act a wrong is its manifest tendency to injure the plaintiff's business, and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. A suit arises under the law that creates the cause of action. *The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract.* If the State adopted for civil proceedings the saying of the old criminal law; the greater the truth the greater the libel, the validity of the patent would not come in question at all. In Massachusetts the truth would not be a defense if the statement was made from disinterested malevolence."

It will be observed that in all material points this case was precisely like the case at bar. In each case it was claimed that the suit involved a question which

was by statute within the exclusive jurisdiction of the District Court. In the case at bar, as in the case cited, this question was not raised or presented by the plaintiff's pleadings. The plaintiff's bill states a case which, under *Pennsylvania R. R. Company* v. *Puritan Coal Mining Company*, 237 U. S. 121, and the other cases cited under Point III of our original argument, was clearly within the jurisdiction of the state court, and under the rule in the *Layne* case and the other cases cited, this established the jurisdiction of the state court in which the suit was brought and that of the District Court to which it was removed.

The fact that an order of the Commission was set up in the answer cannot oust the jurisdiction thus established. Under the authorities cited this would be true even if after the coming in of the answer the decision of the case had necessarily depended upon the question whether the Commission had power to make the order. But in the case at bar, this was not the situation. The defendant relied not only upon the Commission's order but also upon the claim that its method of car distribution was justified by paragraph (12). If the court had sustained this claim, there would have been no occasion to consider the Commission's order, and the case might therefore have proceeded to a final decree without the decision of any question arising upon that order.

We submit therefore that it is impossible to regard the case at bar as a case brought to set aside or enjoin an order of the Commission, and equally impossible to regard the application for an injunction in accordance with the prayer of the bill as an application for an injunction against the order of the Commission.

Neither the case of *North Dakota* v. *Chicago &*

Northwestern Railway Company, decided January 22, 1922, nor *Illinois Central R. R. Co.* v. *Public Utilities Commission,* 245 U. S. 493, cited in the brief for the United States, is in point. They were both cases in which the bills filed directly and expressly attacked orders of the Commission, and the language quoted by counsel from the opinion in the former case cannot be extended to apply to a case in which the plaintiff, being the "absolute master of the jurisdiction he will appeal to," has seen fit not to make such an attack.

It is also contended by appellee that if this is not a suit which must be heard by three judges, it is a suit which involves the reasonableness of the Commission's rule and therefore within the exclusive original jurisdiction of the Commission. This contention also is untenable. The suit is one to enforce a specific statutory right. The only question as to the Commission's order which it presents is whether the Commission had any power or authority to make the order, and it is manifest that the Commission cannot have exclusive original jurisdiction of that question.

The Appellee's Position as to the Construction of Paragraph (12).

The argument of counsel for Appellee in support of their claim that paragraph (12) embodies the rule in the *Traer* case may fairly be said to be remarkable chiefly for what it does not say. It absolutely ignores the fact that the car shortage provision contains as its principal element a peremptory and unqualified direction to apply mine ratings. It does not deny or discuss the evils which we have shown to be the result of the assigned car practice as sanctioned by the rule in the *Traer* case, and it preserves a discreet silence as

to the statement of the House Committee that paragraph (12) was designed to avoid the recurrence of those evils, while it is arguing that the substitution of paragraph (12) for the Senate provision shows that Congress did not intend to take any action against assigned cars. It is hardly possible to regard this procedure as any thing but a tacit confession of inability either to reconcile these facts with the claim that paragraph (12) is declaratory of the rule in the *Tracy* case, or to show that they have no bearing on that claim, and we submit that counsel's argument is, to this extent, a significant and valuable indorsement of the position taken in Point I of our original argument.

On the other hand, counsel have referred in their argument to one matter which seems to be irrelevant and to have a tendency to confuse the question before the court. They discuss at some length the question whether our theory of the construction of paragraph (12) does not involve an invasion of the rights of private car owners. We do not think the case at bar requires the consideration of this question. The bill does not charge that privately owned cars have been distributed by defendant as assigned cars, and it would seem that the question whether privately owned cars are within the class of cars available for transportation of coal designated by paragraph (12), should be left to be determined in some case in which privately owned cars are involved. Whether they are within the statute or not may depend upon considerations which cannot be adequately presented at this time.

The only question presented by this record—the status of railway fuel cars—does not depend in any way

upon the decision as to the status of privately owned cars. If the court holds that the statute prescribes a ratable distribution of the cars to which it applies, there can be no question but railway fuel cars are subject to that rule. That Congress intended it to have at least that scope, is shown by the statements in the report of he House Committee to the effect that the order of the Director General, which prohibited the use of assigned cars for railway fuel, was the basis of paragraph (12), and a decision of this court giving paragraph (12) that effect will not foreclose an independent consideration of the question whether it also includes privately owned cars when a case is presented which raises that question.

Counsel assert that if the railroads are not permitted to use assigned cars they will be unable to obtain the coal necessary to their operation without confiscations of commercial coal. This is doubtless true if they continue to depend upon buying coal when and as they need it. But why should they do so? It is well recognized that one of the worst evils of the coal industry is the seasonal character of the demand, and the public is constantly urged not only by coal operators, but by the Government, to accumulate reserve stocks for the winter during the period of ample car supply. Is there any reason why the railroads should not adopt this reasonable precaution, and thus not only avoid the necessity of using assigned cars or of confiscating coal in transit, but contribute largely to the elimination of the recurrent coal car shortage?

Finally, counsel say that paragraph (12) construed as requiring ratable distribution is not a workable rule. The answer is that it is precisely as workable as it would be if it were construed as requiring a pre-

ferential distribution. What is a "car" within the meaning of the provision; whether a ratable distribution from day to day or from week to week is a substantial compliance with the statute—these and other matters are not specifically provided for. In other words the statute may require further construction or it may become necessary for the Commission to fill in the details. That, indeed, is the proper function of the Commission—to fill in the details of general statutory provisions so that the intention of Congress may be effectuated, not to set them aside.

The Argument of Counsel for Appellee as to the Construction of Paragraph (15).

So far as the case for appellee is based on the Commission's notice of April 15, 1920, it depends absolutely upon the proposition that paragraph (15) deals with the distribution of cars among shippers. Counsel appear to have repudiated the view taken by the Court of Appeals that clause (d) of that paragraph justified the Commission's order (Appellee's Brief, p. 50), and to limit their claim to clause (a). Their contention is that "car service" which is the sole subject-matter of clause (a), includes the distribution of cars among shippers, and that it authorized the Commission to set aside the car distribution rules of appellee.

The primary objection to this is that "car service" does not include the distribution of cars among shippers. Counsel's claim to the contrary rests wholly upon the use of the word "distribution" in the definition of "car service" in paragraph (10). We have shown in our original brief (pp. 65-73) that the history of car service legislation demonstrates that the word

"distribution" in paragraph (10) relates only to the distribution of cars among carriers and not at all to car distribution among shippers, and counsel have attempted no reply to that argument.

But it is unnecessary to rely upon the historical argument. Congress has made the same distinction in terms in the present act. Paragraph (11) provides that the carriers shall "establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service." Paragraph (12) provides that it shall "*also* be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it." If "car service" includes the distribution of cars among shippers, this provision was absolutely superfluous since the provision quoted from paragraph (11) would require that distribution to be just and reasonable. The fact that Congress prefaced the provision in paragraph (12) with the adverb "also" shows that it was proceeding to a new subject-matter, and the fact that it enacted it at all shows clearly that it did not consider its subject-matter to be covered by the term "car service."

But even if car service is to be considered as including car distribution among shippers, and clause (a) as authorizing suspension of car distribution rules, the appellee's case is not helped. We are not concerned with appellee's car distribution rules in this case. The sole question is whether what appellee did in the distribution of cars conformed to the car shortage provision of paragraph (12). Neither a car distribution rule nor the suspension of such a rule could in the slightest degree alter or impair the obligation of appellee to obey the specific provision of paragraph (12).

In closing we venture to direct the court's attention to the fact that while the Court of Appeals, the Commission and the appellee all agree in upholding appellee's use of the assigned car, the reasons of the Court of Appeals for that conclusion are irreconcilable with those of the Commission, and are not accepted by counsel for appellee. We submit that this conflict tends strongly to confirm the position taken in our original brief that the advocates of the assigned car are reading their theories into the statute and not finding them there.

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Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

LAMBERT RUN COAL COMPANY, appellant, v. THE BALTIMORE & OHIO RAILROAD Company, appellee. } No. 153.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIÆ.[1]

[1] The United States appeared by its counsel as *amicus curiæ* before the Court of Appeals. (See Tr. 123; Appellant's brief, 16.)

STATEMENT.

The appeal is from the decree of the Circuit Court of Appeals (Tr. 131) which reversed the order of the District Court (Judge Dayton) and remanded the cause with directions to dismiss the bill (Tr. 131).

The order reversed granted a preliminary injunction against the Baltimore & Ohio Railroad which in effect prevented it from complying with an order of the Interstate Commerce Commission issued on April 15, 1920, modifying the rules governing the distribution of

coal cars. Although the provision under which the commission acted in issuing the order was paragraph (15) of section 1 of the interstate commerce act, the basis of the preliminary injunction was that the Company was not distributing its cars in accordance with paragraph (12) of section 1. The order is as follows (Tr. 105):

APRIL 15, 1920.

Notice to carriers and shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of Government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

"The commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

"'8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio. et al.* v. *H. V. Ry. Co.* (12 I. C. C., 398), and *Traer* v. *Chicago & Alton Railroad Co. et al.* (13 I. C. C. 451),

will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.'

"The commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission."

The words "hereby suspends the operation of the existing rule and *directs* the observance by all carriers by railroad * * * of rule 8 modified as above * * * and until the further direction or order of the commission," clearly impresses the action of the commission with the status of an order.

Lambert Run Coal Company, appellant, filed a bill against the railroad company, appellee, in the Marion County Circuit Court, of West Virginia, (1) to enjoin the railroad company during the period of car shortage from observing or enforcing its car-service rules Nos. 8, 9, and 10, or any or either of said rules, or any other rules, regulations, or practices having like effect; and (2) to compel it to comply with the provisions of paragraph (12) of section 1 of the act to regulate commerce, as amended by the transportation act of 1920, and to maintain and

apply mine ratings, and to count each and every car furnished to or used by the mines for transportation of coal against the mine using it.

In drafting the bill the pleader refrained from making any reference whatever to the fact that the rules attacked were adopted by the railroad company in pursuance of the order of the Interstate Commerce Commission of April 15, 1920, and that the commission issued the order in pursuance of paragraph (15).

The railroad company removed the cause to the United States district court. It then answered the bill and set up the order of the commission and the adoption of its rules in pursuance thereof.

On the hearing of the motion of the coal company for preliminary injunction, the counsel for the railroad company objected to the jurisdiction of the district court over either the parties or subject-matter, assigning as the two main grounds that, (1) even in the absence of any action or order of the commission, application should first have been made to the commission for relief; (2) the commission having acted and its order having been pleaded, the parties and notices essential before its validity or invalidity and effect may be considered were absent, namely, the United States as defendant, separate notices to the Attorney General and the Interstate Commerce Commission, and three judges to sit, at least one of whom shall be a circuit judge. (38 Stat. 219, 220.)

The coal company prevailed against the objections which were overruled by the district judge, who

ordered the hearing to proceed before him alone. After hearing, the district court held in effect that the order of the commission was null and void, that the rules of the railroad company should go for naught, that the prayer of the bill should be granted, and that a preliminary injunction should issue. By a formal decree about which there can be no misapprehension whatever the order of the commission was rendered ineffective and for all practical purposes was set aside completely (Tr. 107, 108). The railroad company was directed "to comply with the provisions of paragraph (12) of section 1 of the interstate commerce act and, during any such period, to maintain and apply mine ratings to all of the mines served by the defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it; * * *" (Tr. 109). The railroad company appealed and the Circuit Court of Appeals promptly stayed and suspended the injunction order (Tr. 122).

On final hearing the Court of Appeals in a unanimous opinion delivered by Circuit Judge Woods (267 Fed. Rep. 776) reversed the decree with directions that the injunction be dissolved and the bill dismissed (Tr. 124–131). From the final decree of the Circuit Court of Appeals the Coal Company has appealed to this court, and by its assignment of errors has challenged the correctness of the opinion and decree of the Circuit Court of Appeals.

THE PERTINENT PARAGRAPHS OF THE ACT.

The transportation act, 1920, provides (41 Stat. 456, 476):

> SEC. 402. The paragraphs added to section 1 of the interstate commerce act by the act entitled "An act to amend an act entitled 'An act to regulate commerce,' as amended, in respect to car service, and for other purposes," approved May 29, 1917, are hereby amended to read as follows:
>
> * * * * *
>
> (12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.
>
> * * * * *
>
> (15) Whenever the commission is of opinion that shortage of equipment, congestion of

traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (*a*) To suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (*b*) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (*c*) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or in the event of their disagreement as the commission may after subsequent hearing find to be just and reasonable; and (*d*) to give

directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded.

ARGUMENT.

I.

The Court of Appeals did not err in holding "that the making and promulgating of rule No. 8 as amended was clearly within the power of the commission" (Tr. 120).

In the brief filed in this court (pp. 62–106) the counsel for the appellant have presented an elaborate argument to the effect that the Circuit Court of Appeals erred in holding that paragraph (15) conferred power on the commission to relieve the carriers of the obligation imposed by paragraph (12), or to prescribe a different rule of car distribution. Moreover, it is argued (p. 82) that if paragraph (15) should be construed as conferring upon the commission authority to give directions as to the distribution of cars among shippers, such authority can not be held to extend to the giving of any directions inconsistent with the express statutory requirements of paragraph

(12). Again, it is argued (p. 97) that paragraph (15) should not be construed as conferring power on the commission to dispense with the car-shortage provisions of paragraph (12) or to establish another rule in its place, for the reason that if it is so construed it involves an invalid delegation of legislative power.

The bill was based on paragraph (12) and the order granting the preliminary injunction refers to that paragraph. The commission based its order on paragraph (15) and the Court of Appeals sustained its authority under that paragraph.

While the two paragraphs may be made effective under different circumstances and conditions they are reciprocal and the one counterbalances the other. Paragraph (12) may well apply to ordinary car shortages which more nearly affect the output of the mines disconnected from the shortage of fuel or public emergency for lack of fuel. Paragraph (15) applies "whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country." For ordinary car shortages due to excessive sales or shipments, or other causes, the commission turns to and is controlled by paragraph (12), but when emergency requiring immediate action exists, such as the public safety or welfare, the commission turns to and is controlled by paragraph (15). There is no ambiguity or inconsistency in the two paragraphs. Each stands on its own foundation. Each is a limitation on the other and the com-

mission is designated as the authority to make the one effective against the other.

The mandate of the statute is that "*whenever the commission is of opinion* that shortage of equipment, * * * or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is hereby given, authority," etc. Thus, in the commission is reposed the sole authority to declare that emergency requiring immediate action exists. It is not to be presumed that the commission will declare that emergency requiring immediate action exists when no such emergency in fact does exist. On the other hand, it may fairly be presumed that if such emergency does exist the commission will not shrink from its duty but will so declare; and that in so declaring the commission will exercise its power providently.

Suffice it to say that for the instant case the commission, by its notice of April 15, 1920, declared that it was of opinion that an emergency exists requiring immediate action and directed the observance by all carriers of rule 8 modified as above.

The form of the legislation is fundamental and is as old as the Government. All of the great statutes for the prosecution of the war were enacted in pursuance of the legislative principle of the flexibility of statutes to meet emergency conditions as they arise, i. e., the national-defense act, the shipping board act, the naval emergency-fund act, the food and fuel control act, and the later and equally important, the transportation act of 1920.

As observed by Circuit Judge Woods in his opinion, the coal company is claiming the benefits of a statute and at the same time asserting the unconstitutionality of its limitations, citing *Daniels* v. *Tearny* (102 U. S. 415); *Grand Rapids & Indiana Railway Co.* v. *Osborne* (193 U. S. 17 (Tr. 130)).

The power of the commission to prescribe rules and regulations for the pro rata distribution of cars to mines for the receipt and transportation of coal was first sustained by the commission itself, *Railroad Commission* v. *Hocking Valley Ry. Co.* (12 I. C. C. 398) and *Traer* v. *Chicago & Alton* (13 I. C. C. 451); and then by this court in *Interstate Commerce Commission* v. *Illinois Central* (215 U. S. 452); *Same* v. *Chicago & Alton* (215 U. S. 479); and *Baltimore & Ohio* v. *Pitcairn Coal Co.* (215 U. S. 481). The rules and regulations announced by the commission in those cases and sustained by this court were finally enacted into statute by paragraph (12) and they have no relation to emergency requiring immediate action.

If the action of the commission is not an order within the meaning of the Commerce Court act (36 Stat. 539) and urgent deficiencies act (38 Stat. 219), then the position of appellant becomes even more difficult, as under the same authorities the appellant should have applied to the Interstate Commerce Commission for a hearing; otherwise uniformity of regulation fails and chaotic conditions result. The district judge specifically limited the effect of the injunction order to "within the jurisdiction of this court" (Tr. 108). Thus, a rule is applied to the Northern

District of West Virginia which does not apply to other districts; moreover, the rule is applied only to a section of a single railroad system. If the courts take jurisdiction in the first instance, other judges in other districts may take different views and enter conflicting orders with the result that the whole purpose of the interstate commerce acts establishing uniformity of regulation, and of the foregoing acts to bring about one judicial review, may be wholly defeated.

It will be observed that in addition to clause (*a*) the powers conferred with respect to clauses (*b*), (*c*), and (*d*) of paragraph (15) are of tremendous import. While not directly involved in the instant appeal, any decision construing paragraph (15) and clause (*a*) thereunder will necessarily have a substantial bearing on the powers of the commission to execute clauses (*b*), (*c*), and (*d*), as all clauses are embraced within the powers conferred by the opening sentence of the paragraph. Ultimately cases may arise in which the railroad companies themselves may attack the validity of clauses (*b*), (*c*), and (*d*) and the powers of the commission thereunder.

II.

The single-handed district judge was without power to enter the decree which in effect enjoined the Baltimore & Ohio from complying with an outstanding unchallenged order of the commission.

In its answer filed in the District Court the Baltimore & Ohio set up the order of the commission and its endeavor in good faith to comply therewith.

In its opinion the court of appeals said (Tr. 130):

> Even if the District Court had been right in refusing the motion to dismiss the bill the order of injunction could not stand, because the execution of the order of the Interstate Commerce Commission could be enjoined only by three judges, one of them being a circuit judge, after notice to the commission and to the Attorney General. Act October 22, 1913, Compiled Statutes, section 998.

With that order of the commission before it, the District Court issued a drastic and sweeping injunction which made it impossible for the Baltimore & Ohio to comply with the commission's order. Passing the question whether the coal company had any standing whatever to file the bill of compliant without first applying to the commission for relief, *Proctor Gamble Co.* v. *United States*, 225 U. S. 282, and cases cited above, the relief prayed and granted rendered ineffective an unchallenged order of the commission with which the company had undertaken to comply. In effect the decree enjoined the force and effect of an order of the commission, as unquestionably the Baltimore & Ohio could not comply with the order of the commission and paragraph (12) at one and the same time.

In *State of North Dakota* v. *Chicago & North Western Ry. Co.* (25 Original), decided January 23, 1922, the bill was filed "against certain named railroad companies to prevent their applying an order of the Interstate Commerce Commission until this court can review the decision upon which that order

was made." In considering the argument that the suit was one to set aside or suspend an order of the commission, this court, speaking through Mr. Justice Holmes, said:

> For although it is argued that the requirement that the United States should be made a party is a mere matter of procedure for the purpose of giving the Department of Justice control, we can not limit the significance of the Judicial Code (sec. 211) by such a speculation. The language of the section shows that public interests were before the mind of Congress, and that in its opinion an order made in the public interest should not be hindered from going into effect until the representatives of the public had been heard. It appears to us that this view is so reasonable that it should be accepted by this court even if not bound.

In *Illinois Central* v. *State Public Utilities Commission* (245 U. S. 493) the carriers filed bills against the Utilities Commission to enjoin the latter from interfering with the carriers in their compliance with an order of the Interstate Commerce Commission. The Utilities Commission filed cross bills which assailed the validity of the Interstate Commerce Commission's order on various grounds and concluded with a prayer that it be set aside and annulled. In holding that the cross bills should be dismissed, this court said:

> Passing the fact that they were presented as *cross* bills, it is apparent that in subject matter and purpose they were suits to set aside the order.

III.

The Court of Appeals had the authority to reverse the order granting the preliminary injunction and to remand the cause with directions that the bill should be dismissed.

The District Court was clearly without jurisdiction to entertain the bill. The coal company objected to the only amendment possible to be made and its counsel were insistent on standing on the case as they first made it.

The Court of Appeals had ample authority, sua sponte, to reverse the judgment with directions to the District Court to dissolve the preliminary injunction and to dismiss the bill. *Smith* v. *Vulcan Iron Works* (165 U. S. 518); *Mast. Foos & Co.* v. *Stover Mfg. Co.* (177 U. S. 485, 494).

That course has been followed in cases challenging unsuccessfully the validity of orders of the commission. *I. C. C.* v. *B. & O. R. R. Co.* (225 U. S. 326, 346); *Los Angeles Switching case* (234 U. S. 294).

The decree should be affirmed.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

MARCH 4, 1922.

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party. Act of October 22, 1913, c. 32, 38 Stat. 208, 220; Jud. Code, §§ 208, 211. P. 381.

2. Jurisdiction of a suit to restrain a railroad company from following rules for car distribution prescribed by the Commission can not be acquired by a state court, or by the District Court upon removal therefrom, through the plaintiff's concealment of the fact that the rules were so prescribed. P. 382. *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, distinguished.

267 Fed. 776, modified and affirmed.

APPEAL from a decree of the Circuit Court of Appeals reversing an order of the District Court, which granted an interlocutory injunction, and directing that the injunction be dissolved and the bill dismissed for want of jurisdiction, in a suit by the appellant to restrain the appellee from following certain rules of car distribution, and to require it to furnish cars upon another basis.

Mr. Frank E. Harkness and *Mr. Rush C. Butler*, with whom *Mr. Ernest S. Ballard* and *Mr. Herbert Pope* were on the briefs, for appellant.

Mr. A. G. Gutheim and *Mr. R. V. Fletcher*, with whom *Mr. Hugh L. Bond, Jr.*, and *Mr. W. S. Bronson* were on the brief, for appellee.

Mr. Solicitor General Beck and *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, by leave of court, filed a brief on behalf of the United States, as *amici curiae*.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The distribution of coal cars in times of car shortage has been a fertile field of controversy. The subject has received much attention from Congress, the Interstate Commerce Commission and the courts. Definite rules for distribution were promulgated by the Commission; and they remained in force for many years. Among these

was the so-called assigned car rule declared by the Commission in *Railroad Commission of Ohio* v. *Hocking Valley Ry. Co.*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton R. R. Co.*, 13 I. C. C. 451, and sustained by this court in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452.[1] As an incident of the war this rule was modified by the Railroad Administration acting in conjunction with the Fuel Administration; and the assignment of cars for railroad fuel was abandoned. When by the Transportation Act, 1920, provision was made for restoring the railroads to private control, § 1 of the Act to Regulate Commerce was amended, among other things, by inserting a paragraph numbered 12, which deals specifically with the distribution of coal cars. Act of February 28, 1920, c. 91, § 402, 41 Stat. 456, 476.

In June, 1920, the Lambert Run Coal Company, a West Virginia corporation, which owns and operates a mine in that State, brought, in the Circuit Court of Marion County, this suit against the Baltimore & Ohio Railroad Company, a Maryland corporation. The bill alleged that there was an acute car shortage; that the railroad had refused to make the distribution required by paragraph 12 of § 1 of the Act to Regulate Commerce and in violation thereof distributed cars in accordance with its own rules 8, 9 and 10, set out in the margin,[2] and that this course was resulting in irreparable injury to plaintiff. The bill

[1] See also *Rail & River Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 14 I. C. C. 86; *Hillsdale Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 19 I. C. C. 356; *In re Irregularities in Mine Ratings*, 25 I. C. C. 286; *Coal and Oil Investigation*, 31 I. C. C. 193, 217; *In re Assignment of Freight Cars*, 57 I. C. C. 760; *Southern Appalachian Coal Operators' Association* v. *Louisville & Nashville R. R. Co.*, 58 I. C. C. 348; *Corona Coal Co.* v. *Southern Ry. Co.*, 266 Fed. 726.

[2] "8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio et al.* v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C.

prayed that the railroad be restrained from observing these rules and that it be required to furnish cars in accordance with the established ratings.

The defendant removed the case to the federal court for the Northern District of West Virginia and there filed in a single pleading a motion to dismiss and an answer. As grounds for the motion it alleged that the case was not one within the jurisdiction of the state court; that, since it did not appear that the Commission had taken any action in respect to the matter complained of, neither court had jurisdiction of the controversy; that the plaintiff had concealed the fact that the rules of the carrier complained of were, as plaintiff knew, rules which had been promulgated by the Commission; that the bill was thus one to restrain enforcement of an order of the Commission; and that the United States and the Commission were indispensable parties. The answer set forth the facts supporting these allegations and, among other things, that the rules promulgated by the Commission and adopted by the carrier had been issued on April 15, 1920, in pursuance of the emergency provision known as paragraph 15, inserted in § 1 of the Act to Regulate Commerce by the Transportation Act, 1920, *supra*, 41 Stat. 456, 476.

Plaintiff then moved in the District Court for an interlocutory injunction. The defendant, insisting that the

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451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

proceeding was one to stay an order of the Commission, objected to a consideration of the motion in the absence of two other judges as provided by Act of October 22, 1913, c. 32, 38 Stat. 208, 220. Both this objection and the motion to dismiss were overruled by the District Judge; and an interlocutory injunction in accordance with the prayer of the bill was issued. From this order defendant appealed to the Circuit Court of Appeals for the Fourth Circuit. That court stayed the injunction pending the determination of the appeal; and later reversed the decree below with directions to dissolve the injunction and dismiss the bill. 267 Fed. 776. The reasons given by the Circuit Court of Appeals for its decision are, in substance, that the car distribution rule complained of appeared on uncontroverted facts to be that prescribed by the order of the Commission issued April 15, 1920; that this order was issued under paragraph 15 of § 1 of the Act to Regulate Commerce; that it was within the emergency powers there conferred; that the rights and duties prescribed by paragraph 12 of that section were not absolute, but were subject to suspension or modification by the Commission in case of emergency, as provided in paragraph 15; and that, therefore, the bill should have been dismissed. It added that the District Court erred in issuing the injunction for the further reason that, since the relief sought was to enjoin an order of the Commission, it could be granted only by a court of three judges.

The decree of the District Court was properly reversed; but we are of opinion that the Circuit Court of Appeals had no occasion to pass upon the merits of the controversy and that the direction should have been to dismiss the bill for want of jurisdiction and without prejudice. The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect

sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges.

But there are in addition two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. Judicial Code, §§ 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 208, 219. *Illinois Central R. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493, 504; *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485; *Texas* v. *Interstate Commerce Commission, ante*, 158. The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction. *Courtney* v. *Pradt*, 196 U. S. 89, 92; *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 258.[1] To the situation here presented,

[1] See also *Fidelity Trust Co.* v. *Gill Car Co.*, 25 Fed. 737, 738–740; *Swift* v. *Philadelphia, &c. R. R. Co.*, 58 Fed. 858, 861; *Summers* v. *White*, 71 Fed. 106, 109; *Auracher* v. *Omaha & St. L. R. R. Co.*, 102 Fed. 1, 2; *Crowley* v. *Southern Ry. Co.*, 139 Fed. 851; *Zikos* v. *Oregon R. R. & Nav. Co.*, 179 Fed. 893, 899; *R. J. Darnell, Inc.* v. *Illinois Central R. R. Co.*, 190 Fed. 656, 658; *Philadelphia & Reading Ry. Co.* v. *Sherman*, 230 Fed. 814.

cases like *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, relied upon by appellant, have no application. For, while it is true that a plaintiff by his first pleading determines what right he will sue on and that the defenses, set up either anticipatorily by him or in due course by the defendant, can not affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. And the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection. Compare *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Goldberg* v. *Daniels*, 231 U. S. 218; *Louisiana* v. *McAdoo*, 234 U. S. 627. The District Court should therefore have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission. *Robinson* v. *Anderson*, 121 U. S. 522; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 287; *Devine* v. *Los Angeles*, 202 U. S. 313, 338. And the Circuit Court of Appeals in remanding the cause to the District Court should have directed a dismissal for want of jurisdiction and without prejudice.

Decree modified and affirmed.

MR. JUSTICE CLARKE took no part in the decision of this case.

LAMBERT RUN COAL COMPANY *v.* BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 153. Argued March 6, 7, 1922.—Decided April 10, 1922.

1. A suit by a shipper to enjoin a railroad company from following rules for car distribution which have been prescribed by the Interstate Commerce Commission under par. 15 of § 1 of the Act to Regulate Commerce as amended by the Transportation Act of 1920, is a suit to stay an order of the Commission, and can be brought only in the District Court, where the application must be heard by three judges and the United States is an indispensable